84-1616

No.

Office - Supreme Court, U.S.
FILED
APR 12 1985
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PARSONS STEEL, INC., JIM D. PARSONS and MELBA L. PARSONS; and A. POPE GORDON, Trustee in Bankruptcy for the Estate of PARSONS STEEL INDUSTRIES, INC.,

Petitioners,

vs.

FIRST ALABAMA BANK OF MONTGOMERY, N. A., and EDWARD HERBERT,

Respondents.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JAMES JERRY WOOD
WOOD AND PARNELL
641 S. Lawrence Street
Montgomery, AL 36101
(205) 832-4202

Counsel of Record for Petitioner, A. Pope Gordon, Trustee in Bankruptcy for the Estate of Parsons Steel Industries, Inc.

FRANK M. WILSON
BEASLEY AND WILSON
418 South Hull Street
Montgomery, AL 36104
(205) 269-2343

Counsel of Record for Petitioners, Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Does the relitigation exception to the Anti-Injunction Act, 28 U.S.C. §2283, grant a federal district court jurisdiction to review the judgment of a state court that a prior federal judgment does not bar a pending state court action?

2. Is the Anti-Injunction Act, 28 U.S.C. §2283, an implied exception to the Federal Full Faith and Credit Act, 28 U.S.C. §1738, so that a federal district court need not give full faith and credit to a state court judgment that a prior federal judgment does not bar a pending state court action?

3. Is a federal district court authorized by the relitigation exception to the Anti-Injunction Act, 28 U.S.C. §2283, to enjoin a pending state court proceeding which considered issues which were not, but arguably could have been, raised in an earlier federal action?

4. Is a federal district court authorized by the relitigation exception to the Anti-Injunction Act, 28 U.S.C. §2283, to enjoin a pending state court proceeding in the absence of a showing of entitlement to an injunction under general equitable principles?

5. Is a litigant bound by a judgment to which he is not a party where the parties to that judgment had no authority to represent him?

TABLE OF CONTENTS

Questions Presented For Review i

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Constitutional Provisions and Statutes Involved 2

Statement of the Case 2

Reasons for Granting the Writ 7

I. The Court of Appeals Decision Raises Questions Of Federal-State Relations Of Critical Importance Which Must Be Settled By This Court 7

A. The Court of Appeals Decision Violates Decisions Of This Court In Granting A Federal District Court Jurisdiction To Sit In Review Of A State Court Decision 9

B. The Court of Appeals Decision Violates In Principle Decisions Of This Court By Recognizing The Anti-Injunction Act As An Implied Exception To The Federal Full Faith And Credit Act 11

C. The Court Of Appeals Decision Violates This Court's Decision In *Atlantic Coast Line Railroad Company v. Brotherhood Of Locomotive Engineers* By Expanding Exceptions To The Anti-Injunction Act . 15

II. The Decision Below Deprived The Trustee Of A Full And Fair Opportunity To Litigate His Claims In Violation Of The Requirements Of Due Process 18

III. This Court Should Grant Certiorari To Resolve A Conflict Among The Circuit Courts Of Appeal Created By The Decision Below 21

Conclusion 23

Appendices:

A: Decision of United States Court of Appeals for the Eleventh Circuit dated December 4, 1984 ..... A-1

B: Opinion and Order of the United States District Court for the Middle District of Alabama dated June 15, 1983 ..... A-31

C: Order of the United States Court of Appeals for the Eleventh Circuit denying rehearing dated January 14, 1985 ..... A-43

TABLE OF AUTHORITIES

Cases:

Amalgamated Clothing Workers of America v. Richman Brothers, 348 U.S. 511, 99 L.Ed. 600, 75 S.Ct. 452 (1955) 15, 17

Allen v. McCurry, 449 U.S. 90, 66 L.Ed. 2d 308, 101 S.Ct. 411 (1980) 8, 12, 13, 14

Angel v. Bullington, 330 U.S. 183, 91 L.Ed. 832, 67 S.Ct. 657 (1947) 12

Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 26 L.Ed. 2d 234, 90 S.Ct. 1739 (1970) 8, 10, 15, 16

Blonder-Tongue Laboratories, Inc. v. University of Illinois, 420 U.S. 313, 28 L.Ed. 2d 788, 91 S.Ct. 1434 (1971) 18, 20

Brown v. Felsen, 442 U.S. 127, 60 L.Ed. 2d 767, 99 S.Ct. 2205 (1979) 12

County of Imperial, California v. Munoz, 449 U.S. 54, 66 L.Ed. 2d 258, 101 S.Ct. 289 (1980) 15

Del Mar Avionics v. Quinton Instruments Company, 645 F.2d 832 (9th Cir. 1981) 22

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 75 L.Ed. 2d 206, 103 S.Ct. 1303 (1983) .. 10

Dombrowski v. Pfister, 380 U.S. 479, 14 L.Ed. 2d 22, 85 S.Ct. 1116 (1965) 7

Expert Electric Company v. Levin, 545 F.2d 1227 (2d Cir. 1977) 22

First Alabama Bank v. Parsons Steel, Inc., 747 F.2d 1367 (11th Cir. 1984) 5, 7

General Foods Corporation v. Massachusetts Department of Public Health, 648 F.2d 784 (1st Cir. 1981) 21

Hansberry v. Lee, 311 U.S. 32, 85 L.Ed. 22, 61, S.Ct. 115 (1940) 19

Haring v. Prosise, ____ U.S. ____, 76 L.Ed. 2d 595, 103 S.Ct. 2368 (1983) 12

Harper Plastics, Inc. v. Amoco Chemical Corporation, 657 F.2d 939 (7th Cir. 1981) 15

Huffman v. Pursue Limited, 420 U.S. 592, 43 L.Ed. 2d 482, 95 S.Ct. 1200, *reh. denied,* 421 U.S. 971, 44 L.Ed. 2d 463, 95 S.Ct. 1969 (1975) 7

Humphreys v. Tann, 487 F.2d 666 (6th Cir. 1973), *cert. denied,* 416 U.S. 956, 40 L.Ed. 2d 307, 945 S.Ct. 1970 (1974) 22

In Re: Parsons Steel Industries, Inc., a Bankrupt, U. S. Bankruptcy Court for the Middle District of Alabama, Number 79-173-N 3

Kremer v. Chemical Construction Corp., 456 U.S. 461, 72 L.Ed.2d 262, 102 S.Ct. 1883, *reh. denied,* 458 U.S. 1133, 73 L.Ed.2d 1405, 103 S.Ct. 20 (1982) 8, 12, 13, 14

Lynch v. Household Finance Corporation, 405 U.S. 538, 31 L.Ed. 2d 424, 92 S.Ct. 1113, *reh. denied,* 406 U.S. 911, 31 L.Ed. 2d 822, 92 S.Ct. 1611 (1972) 7

Migra v. Warren City School District, ____ U.S. ____, 79 L.Ed. 2d 56, 104 S.Ct. 892 (1984)..... 12

Mitchum v. Foster, 407 U.S. 225, 32 L.Ed. 2d 705, 92 S.Ct. 2151 (1972)..... 15

Montana v. United States, 440 U.S. 147, 59 L.Ed. 2d 210, 99 S.Ct. 970 (1979).....12, 19, 20

National Labor Relations Board v. Nash-Finch Company, 404 U.S. 138, 30 L.Ed. 2d 328, 92 S.Ct. 373 (1971) 15

Oklahoma Packing Co. v. Oklahoma Gas and Electric Company, 309 U.S. 4, 84 L.Ed. 537, 60 S.Ct. 215 (1940) 15

Parsons Steel, Inc. v. First Alabama Bank, 679 F.2d 242 (11th Cir. 1982)..... 4

Parsons Steel, Inc., v. First Alabama Bank of Montgomery, N.A., No. 79-259-N (M.D. Ala. 1981) ... 3

Parsons Steel Industries, Inc., v. First Alabama Bank of Montgomery, N.A., Civil Action No. CV-79-179-G 2

Rooker v. Fidelity Trust Company, 263 U.S. 413, 68 L.Ed. 362, 44 S.Ct. 149 (1923) 10

Roudebash v. Hartke, 405 U.S. 15, 31 L.Ed. 2d 1, 92 S.Ct. 804 (1972) 15

Steffel v. Thompson, 415 U.S. 452, 39 L.Ed. 2d 505, 94 S.Ct. 1209 (1974) 7

Toucey v. New York Life Insurance Co., 314 U.S. 118, 86 L.Ed. 100, 62 S.Ct. 139 (1941) 14, 15

Vendo Company v. Letko-vend Corporation, 433 U.S. 623, 53 L.Ed. 2d 1009, 97 S.Ct. 2881 (1977) 9, 15

Woods Exploration and Producing Company, Inc. v. Aluminum Company of America, 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047, 30 L.Ed. 2d 736, 92 S.Ct. 701 (1972) 17, 18

Younger v. Harris, 401 U.S. 37, 27 L.Ed. 2d 669, 91 S.Ct. 746 (1971) 7

Constitutional Provisions and Statutes:

Constitution of the United States, Article IV, Section 1 . 9, 11

Constitution of the United States, Amendment V 2

Bankruptcy Act of 1898, 11 U.S.C. §1 (1977) 3

Bankruptcy Act of 1979, 11 U.S.C. §101 (1979) 3

Bank Holding Company Act, 12 U.S.C. §1972 (1978) .. 3

28 U.S.C. §1254(1) (1977) 1

28 U.S.C. §§1291-1294 (1977) 9

28 U.S.C. §§1330-1363 (1977) 9

Federal Full Faith And Credit Act, 28 U.S.C. §1738 (1977) 2, 5, 11, 12

Federal Habeas Corpus Act, 28 U.S.C. §2254 (1977) ... 13

Anti-Injunction Act, 28 U.S.C. §2283 (1977) ..... *passim*

Miscellaneous:

Restatement of the Law of Judgments, Second, Section 41 21

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PARSONS STEEL, INC., JIM D. PARSONS and MELBA L. PARSONS; and A. POPE GORDON, Trustee in Bankruptcy for the Estate of PARSONS STEEL INDUSTRIES, INC.,

Petitioners,

VS.

FIRST ALABAMA BANK OF MONTGOMERY, N. A., and EDWARD HERBERT,

Respondents.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of The United States Court of Appeals for the Eleventh Circuit is reported at 747 F.2d 1367 and appears as Appendix A hereto; the opinion of the trial court, the United States District Court for the Middle District of Alabama, is unreported and appears as Appendix B hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on December 3, 1984. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed and was denied on January 14, 1985. This Petition for Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution Of The United States, Amendment V

No person shall be...deprived of life, liberty, or property, without due process of law;...

Federal Full Faith And Credit Act, 28 U.S.C. §1738

The judicial proceedings of any court of such State...shall have the same full faith in credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State ....

Anti-Injunction Act, 28 U.S.C. §2283

A Court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

STATEMENT OF THE CASE

On February 15, 1979, Parsons Steel, Inc., (hereinafter "Parsons-Mobile") its wholly owned subsidiary, Parsons Steel Industries, Inc., (hereinafter "Parsons-Montgomery") and its shareholders, Jim D. Parsons and Melba L. Parsons (hereinafter collectively referred to as "Parsons") filed an action in the Circuit Court for Montgomery County, Alabama, against First Alabama Bank of Montgomery, N.A. (hereinafter "Bank"), its loan officer, Edward Herbert (hereinafter "Herbert"), Michael Orange (hereinafter "Orange"), and OSI, Inc., a corporation owned by Orange, *Parsons Steel Industries, Inc., v. First Alabama Bank of Montgomery, N.A.*, Civil Action No. CV-79-179-G, (hereinafter "State Action"). The State Action alleged that loans made to Parsons Steel Industries, Inc. by Bank were forced into default and foreclosed through the actions of Bank, Herbert, Orange and OSI, Inc. The State Action

alleged against Bank false representations beginning in January and continuing through December, 1978, breach of fiduciary duty, conversion, and violation of the Uniform Commercial Code in the sale of repossessed collateral. (Def.Ex.10). Additional claims including fraud and conversion were made against Orange and OSI. (R.50-53)

On April 5, 1979, Parsons Steel Industries, Inc. was adjudicated an involuntary bankrupt (R.281). *In Re: Parsons Steel Industries, Inc., a Bankrupt, Bankruptcy Number 79-173-N.* A. Pope Gordon was appointed Trustee[1] and eventually succeeded to Parsons Steel Industries' interest in the State Action on motion of Bank. (Def.Ex.3).

On May 30, 1979, Parsons-Mobile and Parsons filed a second action against Bank in federal court, *Parsons Steel, Inc., v. First Alabama Bank of Montgomery, N.A.*, Civil Action No. 79-259-N (M.D. Ala. 1981) (hereinafter "Federal Action"). Parsons-Montgomery was not a Plaintiff in that lawsuit and neither Herbert, Orange, nor OSI were Defendants. No damages were sought on behalf of Parsons-Montgomery. Parsons-Mobile and Parsons had no authority to file suit on behalf of Parsons-Montgomery since that corporation had been adjudicated a bankrupt and a Trustee appointed..

The Federal Action alleged only that Bank had conditioned an extension of credit upon a requirement of a change in management and ownership in violation of the Bank Holding Company Act (hereinafter "BHCA") 12 U.S.C. §1972. Bank contended throughout the Federal Action that Parsons-Mobile and Parsons had no standing to bring that action since the damages sought were solely on behalf of Parsons-Montgomery.

---

[1] The Trustee of this Estate was appointed under the former 11 U.S.C. §1, et seq. (Bankruptcy Act of 1898) in that the debtor was adjudicated bankrupt prior to October 1, 1979, the effective date of the "new" Bankruptcy Code (11 U.S.C. §101, et seq.)

The district court repeatedly rejected that contention. Bank did not, however, seek to have the Trustee joined as a party to the Federal Action. The district court ordered the issue of liability tried separate from the issue of damages, (R.269) and after a jury verdict in Plaintiffs' favor (R.278) granted Bank's motion for judgment notwithstanding the verdict. The United States Court of Appeals for the Eleventh Circuit affirmed holding that the facts alleged did not constitute a tying arrangement prohibited by the BHCA. *Parsons Steel, Inc. v. First Alabama Bank,* 679 F.2d 242 (11th Cir. 1982).

Bank plead the federal judgment in the State Action and presented its res judicata defense by motion for summary judgment. That motion was denied. (Def.Ex.4). The judge assigned to the case later recused himself and Bank presented its res judicata defense by motion (Def.Ex.11) to a second state court judge who also ruled that the federal judgment did not bar the State Action. (Def.Ex.20).

Beginning January 31, 1983, the State Action was tried for nine days. Bank and Herbert presented evidence in support of numerous affirmative defenses including waiver, consent, estoppel and res judicata. The jury returned verdicts in favor of Trustee in the amount of $2,000,000.00, in favor of Parsons-Mobile in the amount of $1.00 and in favor of Parsons in the amount of $2,000,000.00. (Def.Ex.22). The trial court entered a final judgment on the jury verdict. Bank moved for judgment Notwithstanding the verdict and for new trial. (R.94)

Prior to a decision on their post-trial motion Bank and Herbert filed this action in federal district court seeking to enjoin Petitioners from collecting the judgment entered in the State Action. Bank's request for injunctive relief was premised on the relitigation exception to the Anti-Injunction Act, 28 U.S.C. §2283, and its contention - previously rejected by the state court - that the judgment in the Federal Action precluded the State Action. (R.1)

The district court in an unprecedented decision entered judgment in favor of Bank and enjoined Petitioners from further prosecution of the State Action. (R.301-316) (Appendix B). The district court made no finding that the injunction was necessary to "protect or effectuate" its prior judgment but instead based the injunction solely on its conclusion that the Federal Action barred the State Action although clearly recognizing the two actions involved different causes of action. (R.303, Appendix B p. A-32). The district court refused to give full faith and credit to the state court's decision on the res judicata issue. The district court also enjoined the Trustee for Parsons-Montgomery although he had not been a party to the Federal Action. The district court made no finding that Trustee had been "virtually represented" by the parties to the Federal Action.

The United States Court of Appeals for the Eleventh Circuit affirmed. *First Alabama Bank v. Parsons Steel,* 747 F.2d 1367 (11th Cir. 1984) (Appendix A). The majority held that the Anti-Injunction Act, 22 U.S.C. §2283 was an implied exception to the Federal Full Faith and Credit Act, 28 U.S.C. §1738, so that the district court was not required to give full faith and credit to the state court's determination that the judgment in the Federal Action did not preclude the State Action.[2] The majority further held that it was within the district court's discretion to enjoin the litigation of issues which were not but arguably "could have been" litigated in the Federal Action even though Bank awaited a decision by the state court before seeking the injunction. 747 F.2d at ____. (Appendix A p. A-1). The majority held that the Federal Action plaintiffs were the virtual representatives of Trustee as to his fraud claim but remanded to the district court to determine whether virtual representation existed as to

---

[2] Not only does the majority opinion represent the first occasion on which the Anti-Injunction Act has been held to be an exception to the Full Faith and Credit Act, it represents the first implied exception to the Act *any court* has found.

Trustee's UCC claim. It is critical to note that neither court below found that the Plaintiffs in the Federal Action had authority to represent the Trustee.

In a vigorous dissent, Judge James C. Hill reasoned that the Anti-Injunction Act did not implicitly amend the Federal Full Faith and Credit Act because the two acts can be construed harmoniously. For that reason the district court was required to give full faith and credit to the state court's determination that res judicata did not apply. Judge Hill further opined that the district court erred in granting the injunction because the State Action and Federal Action involved "different parties and, arguably, different causes of action" so that an injunction was not necessary to "protect or effectuate" the earlier federal judgment. In addition, Bank awaited a judgment on the merit in state court before requesting an injunction which further "complicates the relations between state and federal courts. 747 F.2d at ____. (Appendix A p. A-29).

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Decision Raises Questions Of Federal-State Relations Of Critical Importance Which Must Be Settled By This Court.

The dissenting Judge in the Court of Appeals noted:

> This case presents a thorny problem of federal and state court relations. The law in the area appears relatively unclear, and, with regard to many of the issues addressed in the majority's opinion, the Supreme Court has yet to afford us guidance. Indeed, the Supreme Court may choose to use this case to set forth more definite standards.[3]

The dissenting Judge's position is well taken. Few issues have reached this Court more often than the propriety of a federal injunction of an ongoing state court proceeding.[4] Ultimately this Court must resolve conflicts between co-existing independent court systems.

In *Huffman v. Pursue Limited,* 420 U.S. 592, 43 L.Ed 2d 482, 95 S.Ct. 1200 (1975), Justice Rehnquist, writing for a six member majority, pinpointed the "relevant consideration of federalism" which make this issue so critically important:

> Interference with a state judicial proceeding prevents the state...from effectuating its substantive policies, ...from

---

[3] *First Alabama Bank v. Parsons Steel, Inc.,* 747 F.2d at ____ Appendix A PageA-26.

[4] *See: Younger v. Harris,* 401 U.S. 37, 27 L.Ed 2d 669, 91 S.Ct. 746 (1971); *Dombrowski v. Pfister,* 380 U.S. 479, 14 L.Ed 2d 22, 85 S.Ct. 1116 (1965); *Lynch v. Household Finance Corporation,* 405 U.S. 538, 31 L.Ed 2d 424, 92 S.Ct. 1113 (1972); *Steffel v. Thompson,* 415 U.S. 452, 39 L.Ed 2d 505, 94 S.Ct. 1209 (1974); other cases cited in footnote 7 herein.

> continuing to perform the separate function of providing a forum competent to indicate any constitutional objections interposed against those policies... results in duplicative legal proceedings, and can readily be interpreted "as reflecting negatively upon the state court's ability to enforce constitutional principles."

420 U.S. at 604.

There can be no greater intrusion into a state court proceeding than occurred in this case. The district court's injunction was premised on its conclusion that an earlier federal judgment barred a pending state proceeding. Bank's request for an injunction came only after the state court spent nine days trying a variety of state law issues and determined that the prior federal judgment did not bar the state law claims. The district court made no finding that its unprecedented intrusion into a state court system was necessary to "protect or effectuate" its earlier judgment. In addition, the district court enjoined a state court litigant who was never a party to the Federal Action and whose only opportunity to fully litigate his interests came in state court.

In order to justify such an unprecedented intrusion into state court function, the Court of Appeals found it necessary to restrict the Anti-Injunction Act to an extent prohibited by this Court's decision in *Atlantic Coast Line;*[5] to find an implied exception to the Full Faith and Credit Act where none had been found before violating in principle this Court's decisions in *Allen v. McCurry,*[6] and *Kremer v. Chemical Construction Company;*[7] to expand the jurisdiction of federal district courts to

---

[5] *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 26 L.Ed.2d 234, 90 S.Ch 1739 (1970).

[6] *Allen v. McCurry,* 449 U.S. 90, 66 L.Ed 2d 308, 101 S.Ct. 411 (1980).

[7] *Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 72 L.Ed 2d 262, 102 S.Ct. 1883 (1982).

allow appellate review of a state court decision in these circumstances; and to adopt a definition of virtual representation different from any other circuit. Each of these unprecedented actions raises questions of federal-state relations of critical importance which must be settled by this Court.

The district court's injunction was an unprecedented and unwarranted intrusion into state court function. This Court should grant certiorari "to consider the important question of the relationship between state and federal courts which such an injunction raises." *Vendo Company v. Lektro-vend Corporation,* 433 U.S. 623, 626, 53 L.Ed 2d 1009, 97 S.Ct. 2881 (1977) (Rehnquist, J.)

A. The Court Of Appeals Decision Violates Decisions Of This Court In Granting A Federal District Court Jurisdiction To Sit In Review Of A State Court Decision.

The Constitution of the United States, Article IV, Section 1 provides:

> The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain or establish.

In establishing our federal court system Congress granted limited original jurisdiction to district courts[8] and limited appellate jurisdiction to courts of appeal.[9]

> While the lower federal courts were given certain powers in the 1789 Act, they were not given any power to review directly cases from state courts, and they have been not given such powers since that time. Only the supreme court was authorized to review on direct appeal the decision of state courts.

---

[8] *See:* 28 U.S.C. §§1330-1363.

[9] *See:* 28 U.S.C. §§1291-1294.

Atlantic Coast Line, 398 U.S. at 286.

This Court has on more than one occasion upheld its exclusive jurisdiction to sit in appellate review of state court decisions. In *Rooker v. Fidelity Trust Company,* 263 U.S. 413, 68 L.Ed 362, 44 S.Ct. 149 (1923) the losing party in a state court action sued in federal district court to have the state judgment set aside alleging a denial of due process of law. The district court dismissed for lack of jurisdiction and this court affirmed:

> Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment....To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.

263 U.S. at 416.[10] This Court further emphasized that if the constitutional questions actually arose in the state court proceeding it was the duty of the state court to decide them.

> If the decision was wrong, that did not make the judgment void, but merely left it open to reversal on modification in an appropriate and timely appellate proceeding.

263 U.S. at 415.

That the district court exceeded its jurisdiction and violated this Court's decision in *Rooker* cannot be denied. Bank submitted its contention that the prior federal judgment precluded the State Action to the state court. The state court considered that issue both in pretrial motions and at trial. A final judgment was entered rejecting that defense. At the time it sought the federal injunction Bank had submitted the issue again to the state court

---

[10]Similarly in *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 75 L.Ed 2d 206, 103 S.Ct. 1303 (1983) this Court held that the United States District Court for the District of Columbia had no jurisdiction to review proceedings of the District of Columbia Court of Appeals in a bar admission matter.

in post-trial motions. The district court was able to grant the injunction only by reconsidering Bank's res judicata defense previously rejected by the state court. To do so was an unauthorized exercise of appellate jurisdiction.

Important policy considerations underlie Congress's decision to grant *only* this court authority to review state court judgments. Since this Court will review such judgments only after review by the highest state court, state courts have a full opportunity to avoid federal interference. In addition this Court, the highest court of the land, can exercise its ultimate authority to resolve conflicts between co-existing independent court systems without upsetting the balance of federalism.

This Court should grant certiorari to consider this important question of federal jurisdiction. The lower courts have interpreted 28 U.S.C. §2283 in a manner to undermine this Court's exclusive jurisdiction to review state court judgments.

B. The Court Of Appeals Decision Violates In Principle Decisions Of This Court By Recognizing The Anti-Injunction Act As An Implied Exception To The Federal Full Faith And Credit Act.

The lower courts refused to give full faith and credit to the state court's determination that the federal judgment did not bar the pending State Action. The res judicata issue was presented by Bank as an affirmative defense and a decision on that issue was absolutely necessary to the final judgment rendered by the state court. The Court of Appeals upheld the district court by holding that the Anti-Injunction Act, 28 U.S.C. §2283, is an implied exception to the Federal Full Faith and Credit Act, 28 U.S.C. §1738. That holding contravenes in principle established precedent of this Court.

At the foundation of our federal system is Constitution of the United States, Article IV, §1:

> Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Our forefathers found that principle so important that one of the first acts of Congress was the passage of the Federal Full Faith and Credit Act. Act of May 26, 1790, Ch. 11, 1 Stat. 122. The Act, now codified as 28 U.S.C. §1738, provides in pertinent part:

> The judicial proceedings of any court of such state...shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State...

This Court has granted certiorari on a number of occasions to consider §1738 and has consistently held that §1738 requires federal courts to apply res judicata and collateral estoppel to issues decided by state courts.[11] When a state court has first adjudicated an issue the application of collateral estoppel serves to "promote the comity between state and federal court that has been recognized as a bulwark of the federal system." *Allen v. McCurry,* 449 U.S. at 96.

---

[11] *Angel v. Bullington,* 330 U.S. 183, 91 L.Ed 832, 67 S.Ct. 657 (1947); *Montana v. United States,* 440 U.S. 147, 59 L.Ed 2d 210, 99 S.Ct. 970 (1979); *Brown v. Felsen,* 442 U.S. 127, 60 L.Ed 2d 767, 99 S.Ct. 2205 (1979); *Allen v. McCurry,* 449 U.S. 90, 66 L.Ed 2d 308, 101 S.Ct. 411 (1980); *Kremer v. Chemical Construction Corporation,* 456 U.S. 461, 72 L.Ed 2d 262, 102 S.Ct. 1883 (1982); *Haring v. Prosise,* ____ U.S. ____, 76 L.Ed 2d 595, 103 S.Ct. 2368 (1983); *Migra v. Warren City School District,* ____ U.S. ____, 79 L.Ed 2d 56, 104 S.Ct. 892 (1984).

This Court has made it quite clear that an exception to §1738 can be recognized *only* where a later statute contains an express or implied partial repeal. *Allen v. McCurry, Kremer v. Chemical Construction Corp.* The Federal Full Faith and Credit Act is so fundamental to our federal system that prior to the decision in this case authorization for a federal court to re-examine state court findings had been found *only* in the Federal Habeas Corpus Act which expressly provides for review in certain limited circumstances. *See:* 28 U.S.C. §2254. No court had found an implied exception.

In *Kremer v. Chemical Construction Corp.*, this Court reaffirmed the cardinal principle that repeals by implication are not favored and taught that whenever possible statutes must be read consistently. A repeal by implication may be recognized:

> (1) Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one;...But,...the intention of the legislature to repeal must be clear and manifest...(citations omitted).

456 U.S. at 468.

The Court of Appeals in this case completely disregarded a simple method of reading these two statutes consistently. Judge Hill, in dissent, articulated that method:

> I would conclude that Section 2283 allows the district court to enter an injunction, perhaps grounded in the concept of res judicata, unless the state court has already addressed the res judicata issue on the merits. In cases in which the state court has reached the merits, I would hold that section 1738 requires the federal court to afford full faith and credit to the state courts resolution of the issue.

747 F.2d at ____, App. A p. A-27.

The lack of any direct incompatibility between §2283 and §1738 is alone sufficient to negate an implied repeal. *Kremer v. Chemical Construction Company,* 456 U.S. at 470. Neither does the purpose of passing the Anti-Injunction Act suggest any "clear and manifest" intention to repeal.

The passage of the most recent version of the Anti-Injunction Act was intended to abrogate this Court's decision in *Toucey v. New York Life Insurance Co.,* 314 U.S. 118, 86 L.Ed. 100, 62 S.Ct. 139 (1941) which held that federal courts were without power to enjoin state courts from relitigating issues the federal court had already finally adjudicated. The exception "to protect or effectuate its judgment" allows the action forbidden by *Toucey.* Nothing in the legislative history suggests that Congress intended to allow a *federal court to relitigate* an issue which had previously been fully litigated in a state court - even if that issue is the preclusive effect of a prior federal judgment. The *Toucey* decision did not speak to that issue so it was not necessary for Congress to extend that power in order to overrule *Toucey.*

The Court of Appeals decision recognizing §2283 as an implied exception to §1738 contravenes in principle *Allen v. McCurry* and *Kremer v. Chemical Construction Corp.* Certiorari should be granted to reverse that error.

C. The Court Of Appeals Decision Violates This Court's Decision In *Atlantic Coast Line Railroad Company v. Brotherhood Of Locomotive Engineers* By Expanding Exceptions To The Anti-Injunction Act.

The Anti-Injunction Act,[12] 28 U.S.C. §2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The most important decision of this Court interpreting the Anti-Injunction Act is *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 26 L.Ed 2d 234, 90 S.Ct. 1739 (1970). The circumstances in *Atlantic Coast Line* are remarkably similar to this case. Atlantic Coast Line filed suit in federal court seeking to enjoin picketing at one of its switching yards. The federal district court denied the injunction. Later Atlantic Coast Line sought and obtained an injunction against the picketing in state court. After the state court judgment the union sought to have the federal court enjoin enforcement of that judgment contending that an injunction was necessary to protect the federal court's earlier decision denying the railroad an injunction against picketing. The

---

[12] The Anti-Injunction Act plays such an important role in our federal system that this Court has granted certiorari to construe it on numerous occasions. *See: Oklahoma Packing Co. v. Oklahoma Gas and Electric Company,* 309 U.S. 4, 84 L.Ed 537, 60 S.Ct. 215 (1940); *Toucey v. New York Life Insurance Company,* 314 U.S. 118, 86 L.Ed 100, 62 S.Ct. 139 (1941); *Amalgamated Clothing Workers of America v. Richman Brothers,* 348 U.S. 511, 99 L.Ed 600, 75 S.Ct. 452, (1955);*Mitchum v. Foster,* 407 U.S. 225, 32 L.Ed 2d 705, 92 S.Ct. 2151 (1972); *National Labor Relations Board v. Nash-Finch Company,* 404 U.S. 138, 30 L.Ed 2d 328, 92 S.Ct. 373 (1971); *Roudebush v. Hartke,* 405 U.S. 15, 31 L.Ed 2d 1, 92 S.Ct. 804 (1972); *Vendo Company v. Lektro-Vend Corporation,* 433 U.S. 623, 53 L.Ed 2d 1009, 97 S.Ct. 2881 (1977); *County of Imperial, California v. Munoz,* 449 U.S. 54, 66 L.Ed 2d 258, 101 S.Ct. 289 (1980).

district court issued the injunction and its decision was affirmed by the Court of Appeals. This Court granted certiorari and in reversing held that injunction was not necessary to "protect or effectuate" the earlier federal judgment because that judgment did not consider whether an injunction against picketing was available under state law.

Similarly in the instant case, as noted by both lower courts, the State Action involved issues which were *not resolved* in the earlier Federal Action. Ignoring this Court's decision in *Atlantic Coast Line,* the district court enjoined issues which were not, but in its opinion, "could have been" decided in the Federal Action.

In reaching its decision in *Atlantic Coast Line* this Court articulated several important policy considerations. First, since the prohibition against injunctions rest on the fundamental constitutional independence of state courts "the exception should not be enlarged by loose statutory construction." 398 U.S. at 287. The courts below ignored that teaching.

Second, "lower federal courts possess no power whatever to sit in direct review of state court decisions." 398 U.S. at 296. The courts below ignored that teaching. The district court here made no finding that an injunction was necessary to "protect or effectuate" its judgment but merely substituted its decision that the state action was precluded by the federal judgment for that of the state court. If the Bank "was adversely affected by the state court's decision, it was free to seek vindication of its federal right in the [state] appellate courts and ultimately, if necessary in this court." *Atlantic Coast Line,* 398 U.S. at 296.

Third, because of the absolute prohibition of §2283 and the critical comity considerations involved "any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." 398 U.S. at 297. The courts below ignored that teaching.

It is critical that this Court grant certiorari for another reason. The express prohibition of 28 U.S.C. §2283 "is not to be whittled away by judicial improvisation." *Amalgamated Clothing Workers of America v. Richman Brothers,* 348 U.S. 511, 514, 99 L.Ed 600, 75 S.Ct. 452 (1955). This case represents the most recent in a line of cases "whittling away" at that expressed prohibition.

In *Woods Exploration and Producing Company, Inc. v. Aluminum Company of America,* 438 F.2d 1286 (5th Cir. 1971) the United States Court of Appeals for the Fifth Circuit held the relitigation exception applicable to authorize an injunction *any time* the state proceeding is precluded under the doctrine of res judicata. 438 F.2d at 1312. For the first time, a court required no showing that the injunction was necessary to "protect or effectuate" a prior federal judgment but instead approved an injunction of issues which were not but "could have been" litigated in the prior federal action. The expansion of the relitigation exception in *Woods Exploration* is arguably minor since the federal judgment had been in a federal anti-trust action and the state proceeding enjoined was a state anti-trust action. The issues in both cases although arising under different laws were substantively identical.

The United States Court of Appeals for the Seventh Circuit relying on *Woods Exploration* further expanded the relitigation exception in *Harper Plastics, Inc. v. Amoco Chemical Corporation,* 657 F.2d 939 (7th Cir. 1981). In *Harper* the state court defendant had previously obtained a federal jdugment that its actions related to distribution of plastic raw materials did not violate federal anti-trust laws. The plaintiff then filed a complaint in state court alleging the same facts but basing recovery on breach of contract under state law. The Seventh Circuit, citing *Woods,* held that the state law contract claim could have been joined with the earlier federal claim so that it was now within the district court's discretion to enjoin the state action.

In this case the lower courts relying in *Woods* and *Harper* have stretched the relitigation exception to the point of destroying the independent nature of state courts. The district court made no finding that its injunction was necessary to "protect or effectuate" its prior judgment and specifically recognized that the federal and state action involved different causes of action.[13] In addition the injunction extends to the Trustee whose only opportunity to fully and fairly adjudicate his claims came in state court.

Although *Woods* and *Harper* represent injunctions of doubtful necessity to "protect or effectuate" a prior federal judgment the injunctions in those cases were much less intrusive into state court function than the injunction in this case because they were issued in the early stages of the state court proceedings. Neither of the courts in those cases sat in direct review of a state court by resolving an issue which that court had previously resolved nor did those courts enjoin litigants who were not parties to the federal judgment and who had had no prior opportunity to litigate their claims.

This Court should grant certiorari to halt the "whittling away" of the express prohibition of §2283 which these cases represent.

II. The Decision Below Deprived The Trustee Of A Full And Fair Opportunity To Litigate His Claims In Violation Of The Requirements Of Due Process.

At a minimum due process of law requires that a litigant be afforded the opportunity to present evidence and argument in support of his claims. *Blonder-Tongue Laboratories, Inc. v. University of Illinois,* 402 U.S. 313, 329, 28 L.ed 2d 788, ____, 91 S.Ct. 1434, 1443 (1971). Consequently, one is not bound by

---

[13] "A slightly different question arises in a situation where different causes of action arising from the same factual circumstances are alleged in a second suit." (Appendix B. p. A-32)

a judgment in litigation in which he is not designated as a party or to which he has not been made a party *unless* he is in fact adequately represented by parties who are present with the authority to represent him. *Hansberry v. Lee,* 311 U.S. 32, 85 L.Ed 22, 61 S.Ct. 115 (1940).

In *Montana v. United States,* 440 U.S. 147, 59 L.Ed 2d 210, 99 S.Ct. 970 (1978), this Court considered the circumstances under which a non-party can be bound by prior litigation. In *Montana* a contractor on a federal project filed an action in Montana state court alleging that a gross receipts tax on public, but not private, construction projects violated the United States Constitution by discriminating against the federal government and companies which dealt with it. The tax was ultimately upheld as constitutional by the Supreme Court of Montana. Subsequently, the United States filed an action in United States District Court and a three judge panel held that the gross receipts tax violated the supremacy clause. On appeal this Court reversed and held that the United States, although not a party to the state court litigation, was bound by it because the United States had a sufficient "laboring oar" in the conduct of that litigation. In reaching that decision this Court noted the undisputed evidence that the United States required the state court lawsuit to be filed, reviewed and approved the complaint, paid attorneys' fees and costs, directed the appeal and filed an amicus brief. By directing the state court litigation the United States had a full and adequate opportunity to litigate the issues and was therefore bound by that court's decision.

In the instant case the courts below did not, nor could they, find that the Trustee had a "laboring oar" in the Federal Action. The Trustee played no role in the decision to file that action, did not participate in any manner in that action and did not contribute toward attorneys' fees or expenses.

In the absence of virtual representation the courts below found that the Trustee was the Federal Action Plaintiff's "privy" and that he could have intervened in the Federal Ac-

tion.[14] The Court of appeals based that decision on an erroneous factual assumption: that the Federal Action ws pending when Parsons-Montgomery was adjudicated bankrupt. 747 F.2d at ____, Appendix A p. A-23. In fact, the federal action was initiated by Parsons-Mobile and Parsons *after* Parsons-Montgomery was adjudicated bankrupt and a Trustee appointed. The parties to the federal action had no authority to represent - and did not attempt to represent - Parsons-Montgomery. These parties sought only to recover damages they suffered separate and distinct from Parsons-Montgomery. Although Bank on several occasions argued that the Federal Action plaintiffs had suffered no damages separate from the bankrupt corporation and therefore had no standing to bring that action the district court rejected that argument. Since no claims were made on behalf of the bankrupt corporation in the federal action there was no reason for the Trustee to intervene.

Writing for a unanimous court in *Blonder-Tongue v. University of Illinois,* Justice White stated:

> Some litigants - those who never appeared in a prior action - may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

402 U.S. at 329. The Trustee in this case has been denied due process of law. His only chance to present evidence and argument on his claim occurred in the State Action. The district court's unprecedented injunction denying him the right to proceed to collect the damages awarded him in that action denies

---

[14] The use of the term "privy" in the context of preclusion of nonparties "has been criticized as conclusory and analytically unsound." *Montana v. United States,* 440 U.S. at 154, note 5.

due process of law. This Court should grant certiorari to protect the Trustee's only opportunity to fully and fairly litigate his claims.

III. This Court Should Grant Certiorari To Resolve A Conflict Between The Circuit Courts Of Appeal Created By The Decision Below.

The Court of Appeals opinion represents the first time a court has found virtual representation in the absence of a finding that the party to be estopped expressly or impliedly authorized a party to represent him in prior litigation. That decision creates a conflict among the circuit courts of appeals which this Court should resolve.

In *General Foods Corporation v. Massachusetts Department of Public Health,* 648 F.2d 784 (1st Cir. 1981) the Court of Appeals for the First Circuit held that in order to be virtually represented a party must expressly or impliedly grant another party authority to represent him.[15] In that case two food companies, General Foods Corporation and Rich-SeaPak Corporation brought an action against the Massachusetts Department of Health challenging the constitutionality of state regulation of food labeling. The defendant claimed that an earlier state court judgment in an action brought by two trade associations precluded that action. The district court dismissed the federal action on res judicata grounds. On appeal the court of appeals held that because General Foods had been a member of both trade associations and had contributed $2,500.00 toward expenses of the earlier litigation it had expressly or impliedly authorized the trade association to represent it and for that reason was bound by the prior judgment. The court reversed however as to Rich-SeaPak Corporation because that corpora-

---

[15] This definition of virtual representation accords with the *Restatement of the Law of Judgments Second* §41(1)(b).

tion had neither been a member of either trade association nor in any manner directed the prior litigation.[16]

Similarly in *Humphreys v. Tann,* 487 F.2d 666 (6th cir. 1973), *cert. denied,* 416 U.S. 956, 40 L.Ed 2d 307, 94 S.Ct. 1970 (1974). The Sixth Circuit Court of Appeals permitted a plaintiff to sue the owner of an airplane involved in a mid-air collision even though an earlier suit had relieved the owner of liability. Even though the attorney for the plaintiff had participated in pretrial discovery and litigation conferences for the first trial the Court of Appeals for the Sixth Circuit permitted the plaintiff to have a separate day in court to try his theory of liability.

In *Del Mar Avionics v. Quinton Instruments Company,* 645 F.2d 832 (9th Cir. 1981) the Ninth Circuit Court of appeals held that an instrument manufacturer was barred from relitigating a patent infringement issue which had been resolved in an earlier action against the manufacturer's distributor. Since the manufacturer had authorized its distributor to represent it in those issues and had directed the prior litigation it had had its opportunity to fully and adequately litigate those issues.

Each of these cases includes as an element of the definition of "virtual representation" the requirement that a party to the prior litigation act with implied or expressed authority of the party now sought to be bound. In the instant case the Eleventh Circuit Court of Appeals has eliminated that element and in doing so has created a new definition of "virtual representation". Because its new definition is in conflict with prior decisions of the First, Second, Sixth and Ninth Circuit Courts of Appeal this Court should grant certiorari to resolve that conflict.

---

[16] The United States Court of Appeals for the Second Circuit reached a similar conclusion in *Expert Electric Company v. Levine,* 545 F.2d 1227 (2nd Cir. 1977).

CONCLUSION

The issues presented by this case strike at the heart of our federal system. By establishing the Anti-Injunction Act as an exception to the Full Faith and Credit Act, by expanding the relitigation exception to the Anti-injunction Act and by allowing a federal district court to sit in direct review of a state court decision the courts below have upset the balance between our co-existing independent court systems. When friction arises between those systems this Court must resolve the conflict. The Petition for Certiorari should therefore be granted.

Respectfully submitted,

FRANK M. WILSON
418 South Hull Street
Montgomery, Alabama 36104

Counsel of Record for
Petitioners Parson Steel, Inc.,
Jim D. Parsons and
Melba L. Parsons

JAMES JERRY WOOD
641 S. Lawrence Street
Montgomery, Alabama 36101

Counsel of Record for
Petitioner A. Pope Gordon,
Trustee in Bankruptcy for
the Estate of Parsons Steel
Industries, Inc.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 83-7395

First Alabama Bank Of Montgomery, N.A.
and Edward Herbert,
Plaintiffs-Appellees,

v.

Parsons Steel, Inc., et al.,
Defendants,

A. Pope Gordon, Trustee in Bankruptcy for the
Estate of Parsons Steel Industries, Inc.,
Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons,
Defendants-Appellants.

December 4, 1984

Appeals from the United States District Court
for the Middle District of Alabama.

Before GODBOLD, Chief Judge, HILL, Circuit Judge, and THORNBERRY*, Senior Circuit Judge.

THORNBERRY, Senior Circuit Judge:

Appellants are appealing from a district court order enjoining them from further prosecution of an Alabama circuit court case on the grounds that, under principles of res judicata, the state action should have been barred by a prior federal court judg-

---

* Honorable Homer Thornberry, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

ment. We hold that, in general, the injunction was not an abuse of discretion. We remand the case, however, with instructions that the district court make further fact findings and, if necessary, modify the existing injunction.

I. *The Facts*

This case involves two separate lawsuits stemming from a series of bank transactions involving the First Alabama Bank of Montgomery ("Bank"), Edward and Melba Parsons, and Parsons Steel Industries, Inc., of Montgomery ("Parsons-Montgomery"). Parsons-Montgomery was a wholly owned subsidiary of Parsons Steel, Inc. ("Parsons-Mobile"), and this parent company was in turn co-owned by Melba and Edward Parsons.[1]

The subsidiary, Parsons-Montgomery, was heavily financed by the Bank, and by the fall of 1978 it owed the Bank one million dollars in secured loans. Anticipating that Parsons-Montgomery would be unable to make payments on these loans, Edward Parsons and the Bank began to discuss the possibility of refinancing the company, or of selling the company to a third party. After one attempt to sell the company failed, the Bank contacted a local businessman and customer, Michael Orange. Although Orange did not want to purchase the company, he and Parsons agreed in December 1978 that Orange would assume management of the company for a fee and a stock option. Orange soon discovered that the company was in worse condition than he had been led to believe, and he resigned. After Orange bailed out, in January 1979 the Bank commenced foreclosure proceedings against Parsons-

---

[1] Melba Parsons owned 98 of Parsons-Mobile's 100 shares of stock, Edward Parsons owned one share, and a Baptist minister owned the remaining share.

Montgomery. The subsidiary's assets were sold to Michael Orange's corporation, OSI, Inc.[2] in a foreclosure sale.

The Lawsuits

Edward and Melba Parsons, Parsons-Montgomery and Parsons-Mobile filed suit against the Bank and bank officer Edward Herbert in an Alabama circuit court in February 1979. That suit also named Michael Orange and OSI, Inc. as defendants. The complaint, in essence,[3] alleged that the Bank had fraudulently forced the Parsons to allow Michael Orange to take control of Parsons-Montgomery, and eventually to obtain complete ownership of that company. The complaint also included various counts against Orange and OSI, Inc. alleging *inter alia* wrongful conversion of company assets and breach of fiduciary duty.

In May 1979, Melba and Edward Parsons and Parsons-Mobile filed suit against the Bank in federal district court. Parsons-Montgomery was not a party to this action. That company had been adjudicated an involuntary bankrupt in April 1979 and the trustee in bankruptcy chose not to participate in the suit. In the state action, however, the trustee was added as a party plaintiff by the state court in October 1979.

The complaint filed in federal court alleged that the Bank had violated the Bank Holding Company Act Amendments, 12 U.S.C. §§ 1971-1978 ("BHCA"), by forcing the Parsons to allow Orange to take control, and ultimately ownership, of Parsons-Montgomery. Such action, the complaint alleged, con-

---

[2] Michael Orange was chief executive officer of OSI, Inc.

[3] We make no attempt to outline the detailed complaints filed in both state and federal court; our descriptions are intentionally general.

stituted a type of unusual banking procedure prohibited under the Act.[4]

Discovery was conducted jointly and simultaneously in the federal and state actions. The federal court severed the liability issue from the damages issue, and proceeded to trial before the state court action. After a jury trial in favor of the plaintiffs, the court entered a judgment n.o.v. for the defendant Bank in June 1981. This decision was affirmed in *Parsons Steel, Inc. v. First Alabama Bank of Montgomery,* 679 F.2d 242 (11th Cir. 1982).

The Bank raised the defenses of res judicata and collateral estoppel in state court after the federal judgment was entered, but the state court ruled that res judicata did not bar the state action. Almost a year after the federal judgment, the trustee in bankruptcy for Parsons-Montgomery amended the state court complaint to include a UCC claim that the bank's foreclosure sale of Parsons-Montgomery's assets was commercially unreasonable. In January 1983, Michael Orange and OSI, Inc. were dismissed as defendants in the state suit as a result of a pro tanto settlement. After a jury trial in state court, the jury returned a general verdict in favor of the plaintiffs and awarded a total of four million and one dollars in damages.[5]

---

[4] Chapter 22 of the BHCA, adopted in 1970, is directed at bank tying arrangements. *See Swerdloff v. Miami National Bank,* 584 F.2d 54 (5th Cir. 1978). It prohibits a bank from conditioning credit upon the requirement that "the customer provide some additional credit, property or service" that is not usually provided in connection with a loan. 12 U.S.C. § 1972(1)(C). A person suing under this statute is entitled to recover treble damages plus attorney's fees. 12 U.S.C. § 1975.

[5] Melba and Edward Parsons were awarded one million dollars each, the trustee in bankruptcy was awarded two million dollars, and Parsons-Mobile, the parent company, was awarded one dollar.

After losing in state court, the Bank and Edward Herbert[6] filed the present action in the same federal district court that had entered the first judgment in the BHCA action. The Bank requested that the district court enjoin the enforcement of the state court judgment on the basis of res judicata and collateral estoppel. The defendants in the present action were the plaintiffs in the state action; Melba and Edward Parsons, Parsons-Mobile, and the trustee in bankruptcy for Parsons-Montgomery.

In a well-reasoned opinion, the federal district court found that the federal BHCA action and the state action were based on the same factual allegations and the damages claimed in each suit were substantially the same. The district court held that any additional state claims relating to the fact situation could have and should have been raised in federal court under the doctrine of pendent jurisdiction. The BHCA action was therefore res judicata as to the state action. Because the state court judgment in effect nullified the federal court judgment in favor of the Bank, the federal court, pursuant to 28 U.S.C. § 2283, enjoined further prosecution of the state court action in order to protect or effectuate its prior judgment.[7]

The district court also held that the trustee in bankruptcy, although not a party to the BHCA action, was bound by the judgment in that action because the trustee was in privity with the parties to that action. Because the facts in this case put the

---

[6] We will refer to both plaintiffs in this injunction action simply as the "Bank."

[7] 28 U.S.C. § 2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

trustee in a different posture from the other appellants, we will address the injunction as it relates to the trustee in a separate section of this opinion after we have resolved the other issues raised in this appeal.

II. *Res Judicata — The Parsons*

The district court found that the Parsons attempted to split a single cause of action by asserting a BHCA violation in federal court and claims of fraud and commercial unreasonableness in state court. In both actions the plaintiffs claimed that the Bank had deliberately put Parsons-Montgomery in a position where it could not pay its debts. The Bank then allegedly promised further credit only on the condition that the Parsons allow Michael Orange, a valued customer of the Bank, to take control of the company. The Parsons claimed that they had no choice but to relinquish control of their company. After Orange decided that the management arrangement was unsatisfactory, he and the Bank allegedly devised a plan whereby the Bank would foreclose on the company's assets and Orange's company would purchase the assets at the foreclosure sale. These activities were claimed to be a violation of the BHCA in federal court. The same activities were the basis for the fraud claims in state court. The district court also found that the claim that the foreclosure sale was made at a commercially unreasonable price appeared in the federal case as evidence of damages and in the state case as a violation of the UCC.

In an opinion granting the Bank's motion for judgment n.o.v., the federal court made several important findings of fact in addition to holding that the Bank did not violate the BHCA. The plaintiffs in the BHCA action had attempted to prove that the Bank, as a condition of an extension of credit, required the Parsons to relinquish control and ownership of their business to Orange. The federal court found as a matter of fact that the Bank did not require the Parsons to give up control or ownership of their company. Although the Bank introduced Orange

to Parsons as a potential purchaser of the company, Parsons and Orange reached an agreement independently of the Bank. The agreement provided that Orange was to manage the business in exchange for a fee and a stock option. The court found that the stock option was included in the deal, not as a method by which Orange could wrench ownership away from the Parsons, but simply as a means of compensation because cash flow problems prevented the company from paying Orange entirely in cash. In the final analysis, the district court found that the Bank had not promised the Parsons anything, nor had it forced the Parsons to take any action. It was not until the actual foreclosure and sale of assets, a normal procedure, that the Parsons had to give up ownership of the company's assets, which resulted in Parsons-Montgomery being adjudicated an involuntary bankrupt. It is undisputed that the Bank, at all relevant times, had a right to proceed with this foreclosure.

In view of these findings, the district court in this injunction proceeding found that its earlier judgment was res judicata as to the Parsons' state claims of fraud and commercial unreasonableness.

The principle of res judicata "makes a final, valid judgment conclusive on the parties, and those in privity with them, as to all matters, fact and law, that were or should have been adjudicated in the proceeding." *Woods Exploration & Production Company v. Aluminum Company of America,* 438 F.2d 1286, 1312-13 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972), (quoting 1B Moore, Federal Practice ¶ 0.405[1] at 6240).[8]

---

[8] The confusion generated by the use of the terms "collateral estoppel," "issue preclusion," "claim preclusion" and "res judicata" was addressed by Mr. Justice Blackmun in a recent Supreme Court opinion.

Both Parsons-Mobile and the Parsons were parties to the federal BHCA action, and it is clear that the judgment in that action was a final judgment on the merits. As to these parties, therefore, the only issue is whether the claims made in the state court proceeding involve matters of fact or law that were or should have been adjudicated in the federal BHCA action.

The preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of "res judicata." See Restatement (Second) of Judgments, Introductory Note before ch. 3 (1982): 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4402 (1981). Res judicata is often analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion." Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. See Restatement, *supra,* § 27. This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar. *See id.*, Introductory Note before §24.

This Court on more than one occasion has used the term "res judicata" in a narrow sense, so as to exclude issue preclusion or collateral estoppel. See e.g., *Allen v. McCurry,* 449 U.S. 90, 91 [101 S.Ct. 411, 413, 66 L.Ed.2d 308] (1960); *Brown v. Felsen,* 442 U.S. 127 [99 S.Ct. 2205, 60 L.Ed.2d 767] (1979). When using that formulation, "res judicata" becomes virtually synonymous with "claim preclusion." In order to avoid confusion resulting from the two uses of "res judicata," this opinion utilizes the term "claim preclusion" to refer to the preclusive effect of a judgment in foreclosing relitigation of matters that should have been raised in an earlier suit. For a helpful explanation of preclusion vocabulary, see Wright, *et al., supra,* § 4402.

Migra v. Warren City School District Board of Education, ____ U.S. ____, 104 S.Ct. 892, 894 n. 1, 79 L.Ed.2d 56 (1984). Although the Supreme Court chose to use the term "claim preclusion" in *Migra,* we will use the term "res judicata" for the simple reason that all of the authority discussed in this opinion speaks in terms of res judicata.

A. THE FRAUD CLAIM

Although the plaintiffs in the BHCA action did not raise the claim of common law fraud, the district court held that they should have raised it. The same primary wrong was alleged in both actions: the Bank wrongfully required the Parsons to give up management and ownership of their business. The damages caused by this "wrong" were the same in both the federal and state actions.

The standard applicable to the present case was clearly set forth in *Woods Exploration.*[9] There the court explained that res judicata applies to separate claims that are simply alternative grounds of recovery for the same basic cause of action. The court stated:

> The principle of *res judicata,* enforceable by injunction, would thus preclude relitigation in the state following this federal judgment if the state and federal courts involve substantially the same wrongs measured by similar standards of liability so that recovery in the federal suit will have compensated plaintiffs for the total harm suffered. See Note, Parallel State and Federal Remedies, 71 Harv.L. Rev. 513, 523-24 (1957). Alternatively, even if different standards of recovery existed in the state and federal actions, *res judicata* would be applicable if plaintiffs were afforded an opportunity to allege the state grounds which constituted the same cause of action in the federal pro-

---

[9] It is undisputed that federal res judicata law applies in the present case where a federal court is determining the effect of a federal judgment. If this court were determining the res judicata effect of a state judgment, the res judicata law of that state would apply. *Migra v. Warren City School District Board of Education,* ____ U.S. ____, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984) ("It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.").

> ceedings. See Restatement, Judgments § 62. Focusing on the latter test, we think that the doctrine of pendent jurisdiction, see *Hurn v. Oursler,* 1933, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148, afforded plaintiffs opportunity for joinder.

Woods Exploration, 438 F.2d at 1315 (footnote omitted). *See Harper Plastics, Inc. v. Amoco Chemicals Corporation,* 657 F.2d 939 (7th Cir. 1981) (prior judgment is conclusive as to any ground of recovery which might have been presented); *see also Nilsen v. The City of Moss Point, Miss.,* 701 F.2d 556, 560 (5th Cir. 1983) ("[O]ne who has a choice of more than one remedy for a given wrong,. . .may not assert them serially, in successive actions, but must advance all at once on pain of bar.").

The Parsons' fraud claim was simply an alternative ground of recovery for the acts that were allegedly a violation of the BHCA. The facts forming the basis of the fraud claim were fully adjudicated in the federal BHCA action. As the district court noted, recovery under the BHCA claim would have compensated the Parsons for the total harm suffered. And under the doctrine of pendent jurisdiction, the Parsons had an opportunity to pursue their claim of fraud in federal court. The district court was correct in holding that the judgment in the federal action was res judicata as to the Parsons' fraud claim in the state court.

B. THE UCC CLAIM

Unlike the fraud and BHCA claims, which were merely alternative grounds of recovery for the same wrongdoing, the UCC claim alleges a separate and distinct wrongdoing by the Bank. The UCC claim involves the actual foreclosure sale and alleges the Parsons were wronged by the receipt of an unfairly low price for their assets; whereas, the BHCA and fraud claims involved a wrong allegedly committed during the events leading up to that sale. Nevertheless, the district court correctly held that the UCC claim could have and should have been raised by the Parsons in the federal BHCA action.

Allegations that the sale was commercially unreasonable were included in the federal BHCA complaint as part of the proof of damages. That is, the Parsons alleged that the defendants' wrongful conduct prior to the sale resulted in the Parsons not receiving a fair price for their company assets at the foreclosure sale. However, the reasonableness of the sale price was never actually adjudicated in the BHCA action. The district court bifurcated the trial to handle the question of liability first, and then, if necessary, address damages. Because the damages issue was never reached, evidence of an insufficient price was never presented to the jury.

In state court, the Parsons claimed that the time and terms of the sale were commercially unreasonable under UCC standards. See ALA.CODE §§ 7-9-504, 7-9-507 (1975).[10] UCC section 9-504, which governs the resale of collateral, requires that the creditor send notice and that every aspect of the sale be commercially reasonable, including the method, manner, time, place and terms. The federal court in the BHCA action found that the Parsons waived the notice requirement, leaving open only the question of whether the actual sale was commercially unreasonable. This issue amounts simply to a claim that the price at the sale was insufficient. "The 'method, manner, time, place and terms' tests are really proxies for 'insufficient price,' and their importance lies almost exclusively in the extent they protect against an unfairly low price." White & Summers, Uniform Commercial Code, § 26-9, at 1109 (2d ed. 1980).[11]

---

[10] Section 7-9-504 provides that every aspect of the disposition of security of a loan upon foreclosure must be commercially reasonable, and section 7-9-507 provides a cause of action to recover from the secured party any loss caused by a failure to comply with section 7-9-504.

[11] The record in this appeal does not indicate what precise facts the UCC claim is based on. That is, it is unclear whether the claim is based on allegations that something about the handling of the *actual sale* was commercially unreasonable and resulted in an insufficient price or whether the UCC claim is based solely on allegations that improprieties involving the Bank and Orange prior to the sale resulted in an unfairly low price.

The issue is whether the BHCA proceeding involves the same cause of action as the Parsons asserted in their UCC claim in the state court. We believe the district court was correct in holding that it does. The bar of res judicata "extends not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same 'operative nucleus of fact.' " *Olmstead v. Amoco Oil Co.*, 725 F.2d 627, 632 (11th Cir. 1984). The events leading up to the foreclosure sale and the sale itself involved a series of connected transactions out of which the Parsons' action arose. This is partially evident from the fact that the Parsons found it necessary to allege the facts surrounding the foreclosure sale in order to prove damages in the BHCA action. Although the UCC claim and the BHCA claim alleged distinct acts of wrongdoing, the facts underlying those claims arise out of the same nucleus of operative facts. This is true regardless of what the UCC claim alleges was the cause of the unreasonably low price. A claim that the foreclosure sale violated the UCC should have been raised by the Parsons in the federal action.

The fact that the conduct of the foreclosure sale and the sufficiency of the price were not adjudicated in the BHCA action does not affect the result. "Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown v. Felsen*, 442 U.S. 127, 131, 99 S.Ct. 2205, 2209, 60 L.Ed.2d 767 (1979). Moreover, had the Parsons asserted UCC commerical unreasonableness as a theory of liability in the BHCA action, rather than merely alleging the facts of the sale as proof of damages, the conduct of the sale would have been adjudicated.

The district court was also correct in holding that the Parsons could have raised the state law UCC claim in the federal BHCA action under the doctrine of pendent jurisdiction.

As to the parsons and Parsons-Mobile, none of the district court's fact findings necessary to the determination of res

judicata were clearly erroneous and the court did not err in its conclusion of law. We must now turn to the issue of whether the district court abused its discretion by enjoining the appellants from enforcing the state court judgment.

III. *The Anti-Injunction Act's Relitigtion Exception*

The Anti-Injunction Act prohibits a federal court from enjoining state court litigation unless the injunction falls within one of three limited exceptions: (1) if expressly authorized by Congress; (2) where necessary in aid of a federal court's jurisdiction; and (3) to protect or effectuate a federal court's judgment. 28 U.S.C. § 2283. The district court in the present case issued its injunction under the third of these exceptions, the relitigation exception. As stated in *Woods Exploration,* "[t]he 'relitigation' principle ... means simply that a federal court may enjoin a state court proceeding which is precluded under the doctrine of *res judicata.*" 438 F.2d at 1312.

The district court's earlier judgment in the BHCA action was in favor of the Bank. This judgment was res judicata as to the state action which resulted in a contrary judgment, awarding appellants the damages that were denied them in the federal action. Accordingly, the district court enjoined appellants from enforcing that state court judgment in order to effectuate its own previous judgment.

Although district courts have been warned to be hesitant in enjoining state litigation, *see Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970), the decision of whether to take such action remains one of discretion for the district court. *Delta Air Lines, Inc. v. McCoy Restaurants, Inc.,* 708 F.2d 582 (11th Cir. 1983) ("Within the limits of that discretion, a district court in a given case might go either way and not be reversed."). Because of the sensitive nature of interfering with state court systems, district courts require that

parties requesting an injunction make a strong and unequivocal showing of relitigation. *In re Corrugated Container Antitrust Litigation,* 659 F.2d 1332, 1334 (5th Cir.1981), *cert. denied,* 456 U.S. 936, 102 S.Ct. 1993, 72 L.Ed.2d 456 (1982). This approach is justified by the idea that "[i]f the federal court is too cautious, 'all is not lost. A state court is as well qualified as a federal court to protect a litigant by the doctrines of res judicata and collateral estoppel.' " *Delta Air Lines, Inc. v. McCoy Restaurants, Inc.,* 708 F.2d 582, 585-86 (11th Cir. 1983)(quoting *Southern California Petroleum Corp. v. Harper,* 273 F.2d 715, 719 (5th Cir.1960)).

In the present case, however, the district court had the benefit of knowing that the Bank was denied the protections of res judicata and collateral estoppel in state court. As noted by the district court, it is easy to understand how the state court was misled into thinking that the federal cause of action was distinct from the state claims because the pleadings were vague and complicated. The federal district judge, having tried the federal action, was in a uniquely qualified position to determine that the federal action was res judicata as to the state action. *See Delta Air Lines,* 708 F.2d at 586 (district judge who presided over federal ction was in best position to assess whether claims raised in state court were the same as those asserted in federal action). After finding the BHCA action to be res judicata to the subsequent state action, the district court was justified in holding that an injunction was necessary to effectuate its prior judgment.

Appellants raise a variety of arguments as to why the injunction was an abuse of discretion. First, they assert that the state court has already ruled on the question of whether the BHCA was res judicata as to the state court action. Because the state court held that the federal action was not res judicata, appellants argue, the Bank is now collaterally estopped from relitigating this issue in federal court.

It is true that, as between courts in two states, if one court (court A) holds that a prior judgment in the court of another state (court B) is not res judicata as to the action in court A, court B is then bound by this determination under the Full Faith and Credit Clause of the Constitution. U.S. Const. ARt. IV, § 1. *See* Wright, Miller, & Cooper, Federal Practice and Procedure, § 4404 (1981). It is also true that federal courts are generally bound by state court rulings under the Federal Full Faith and Credit Statute, 28 U.S.C. § 1738. In absence of federal law modifying the operation of § 1738, we would give the Alabama circuit court's res judicata ruling the same effect it would be accorded in the courts of that state. *Migra v. Warren City School District Board of Education,* ____ U.S. ____, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984). In the present case, however, the operation of § 1738 is modified by federal law: the relitigation exception of the Anti-Injunction Act, 28 U.S.C. § 2283.

The relitigation exception was added to the Anti-Injunction Act in 1948 to codify the doctrine which allowed federal courts to enjoin relitigation in state courts of issues that federal courts had already adjudicated. *International Association of Machinists & Aerospace Workers v. Nix,* 512 F.2d 125, 130 (5th Cir.1975). the legislation abrogated the Supreme Court decision in *Toucey v. New York Life Insurance Company,* 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100 (1921), which had rejected this doctrine.[12] In discussing the nature of the relitigation exception, the Fifth Circuit stated,

---

[12] The Revisor's Note to the 1948 revision of the Anti-Injunction Act states "The exceptions specifically include the words 'to protect or effectuate its judgments,' for lack of which the Supreme Court held that the Federal courts are without power to enjoin relitigation of cases and controversies fully adjudicated by such courts." Historical and Revision Notes following 28 U.S.C.A. § 2283. *See International Association of Machinists & Aerospace Workers v. Nix,* 512 F.2d 125, 130 n. 8 (5th Cir.1975).

> Rather than doing violence to principles of federalism, [the relitigation exception], when applied in a proper case, enhances them. As we observed in [*Jacksonville Blow Pipe Co. v. Reconstruction Blow Pipe Corp.*, 244 F.2d 394 (5th Cir.1957)], "nothing would be as productive of friction between the state and the federal courts as to permit a state court to interpret and perhaps to upset such a judgment of a federal court." 244 F.2d at 400. We advanced an even more practical justification for this doctrine in the *Woods Exploration* case: the relitigation exception "prevents multiple litigation of the same cause of action and it assures the winner in a federal court that he will not be deprived of the fruits of his victory by a later contrary state judgment which the Supreme Court may or may not decide to review," 438 F.2d at 1312, citing Note, Federal Power to Enjoin State Court Proceedings, 74 Harv.L.Rev. 726, 734 (1961).

International Association of Machinists & Aerospace Workers v. Nix, 512 F.2d at 130-131.

It is now settled that the relitigation exception enables a federal court to enjoin state litigation which is precluded by the doctrine of res judicata. *Woods Exploration*, 438 F.2d at 1312. A state court's determination of the res judicata effect of a federal court's prior judgment cannot be used to vitiate a federal court's injunction power under the relitigation exception. We therefore hold that, while a federal court is generally bound by other state court determinations, the relitigation exception empowers a federal court to be the final adjudicator as to the res judicata effects of its prior judgments on a subsequent state action.[13]

---

[13] To hold otherwise would mean that a party with a prior federal judgment in its favor would be required to rush back to federal court for a res judicata ruling any time there was a possibility that a state court might rule on the issue first. Such an outcome would initiate a first in time rule which is clearly inappropriate where Congress has provided federal courts with the power to protect or effectuate their judgments.

Appellants' next two arguments relate to the point in time at which the Bank requested a federal injunction. First, appellants argue that the Bank waived its right to an injunction by waiting until after the state action had been tried before requesting an injunction under the relitigation exception. The Bank argues that if it had requested an injunction before the state trial, the federal court would have been inclined to deny the injunction since the state court pleadings obfuscated the fact that the state action involved the same basic cause of action which was tried in the BHCA action. The district court agreed that the pleadings were the source of confusion in these two actions and held that the Bank had not waived its right to an injunction by delaying until after the state trial. We see no reason to disturb this holding. The Bank should not be penalized for its reluctance to come back to federal court while it was not clear whether the federal court's prior judgment was in danger of being nullified.

Alternatively, appellants argue that the Bank's request for an injunction is premature. They assert that an injunction is improper so long as the Bank continues to have a remedy at law. The remedy at law in this case, appellants argue, is the Bank's right to appeal the Alabama circuit court judgment to a state appellate court. This argument has no merit. It would apply with equal force to a party seeking an injunction before a state trial. There, the argument would be that the party's remedy at law was resolution of the issue in the state trial court. In both situations, once it is apparent that a prior federal judgment is res judicata, there is no need to allow a state court system to waste time and effort on the issue. No remedy at law exists to protect the Bank from having to pursue the state action on appeal, just as no remedy at law exists to protect a party from having to relitigate an issue at trial. A federal court is empowered to enjoin state court proceedings to protect its judgment and § 2283 does not limit this power to specific points in time in state court trials or appellate procedure. *See, e.g., Bank of Heflin v. Miles,* 621 F.2d 108 (5th Cir.1980) (district court properly granted injunction which nullified Alabama Supreme Court directive).

Appellants' next argument is that an injunction is unfair in this case because they could not properly join their state claims in federal court. The district court held that appellants could have, and should have raised these claims under pendent jurisdiction. *See United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) (pendent jurisdiction available where claims arise out of a common nucleus of operative fact and be of such nature that one would expect the plaintiff to try them together). Appellants argue, however, that to properly litigate their fraud claims, it would have been necessary to join Michael Orange and OSI, Inc. as defendants in the federal action.[14] Because no independent federal claims were asserted against these additional defendants, appellants argue that they could not be joined as defendants in federal court. This argument misconstrued teh doctrine of pendent party jurisdiction. This circuit explained the nature of pendent party jurisdiction in *Williams v. Bennett,* 689 F.2d 1370 (11th Cir.1982), *cert. denied,* ____ U.S. ____, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983):

> Under this theory, a court in some limited circumstances may bring in "state" parties over which it could not otherwise exercise jurisdiction. *See Aldinger v. Howard,* 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976); *Arango v. Guzman Travel Advisors Corp.,* 621 F.2d 1371, 1377 n. 7 (5th Cir. 1980); *Boudreaux v. Puckett,* 611 F.2d 1028, 1030-31 (5th Cir. 1980); *see, e.g., Connecticut General Life Insurance Co. v. Craton,* 405 F.2d 41 (5th Cir.1968). The exercise of such pendent party jurisdiction turns on judicial economy considerations and whether "... Congress has expressly or impliedly negated the existence of jurisdiction of a pendent claim or party." *Boudreaux,* 611 F.2d at 1031.

---

[14] Orange and OSI, Inc. were defendants in the state action originally, but were later dismissed as a result of a pro tanto settlement.

689 F.2d at 1379 (footnote omitted).

Congress has not expressly or impliedly negated the existence of pendent party jurisdiction in the BHCA, the statute which gave rise to federal jurisdiction in the first action.[15] *Compare Aldinger v. Howard,* 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976)(holding that Congress had negated pendent party jurisdiction over a county in a § 1983 action) *with Lykins v. Pointer Incorporated,* 725 F.2d 645 (11th Cir.1984) (holding that pendent party jurisdiction is available in the context of 28 U.S.C. § 1346(b), which grants federal jurisdiction over torts claims against the United States).

The district court therefore had the power to assert pendent party jurisdiction over Michael Orange and OSI, Inc. The exercise of this jurisdiction is a discretionary decision reserved to the district court. *Williams v. Bennett,* 689 F.2d at 1379. *See also Lykins v. Pointer Incorporated,* 725 F.2d 645 (11th Cir.1984).

The possibility that the district court might have refused to exercise pendent party jurisdiction does not help appellants' position. We agree with the Seventh Circuit's view of this argument.

---

[15] 12 U.S.C. § 1975 provided federal jurisdiction in the BHCA action. That section provides:

> Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including reasonable attorney's fees.

The BHCA, which is aimed at preventing tying arrangements with banks, seems to contemplate the involvement of third parties in federal suits since most tying arrangements do involve third parties. It is not inconsistent with this statute that these third parties be joined in an attempt to resolve all claims arising out of the nucleus of operative facts giving rise to a BHCA action.

> We fail to discern the unfairness in requiring a plaintiff to join all relevant theories of relief in a single proceeding. The uncertainty over whether a trial judge would exercise pendent jurisdiction does not justify permitting the institution of a multiplicity of proceedings which may have the effect of harassing defendants and wasting judicial resources. If appellant entertained any doubts at the pleading stage, they should have been resolved in favor of joinder. *See Federated Department Stores v. Moitie,* 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981)(Blackmun, J., concurring); *Woods Exploration and Producing Co. v. Aluminum Company of America,* 438 F.2d 1286 (5th Cir.1971).

Harper Plastics v. Amoco Chemicals Corporation, 657 F.2d 939, 946 (7th Cir.1981).

IV. *Res Judicata—The Trustee in Bankruptcy*

Neither Parsons-Montgomery nor the trustee in bankruptcy for Parsons-Montgomery ("Trustee") was a party to the BHCA action. Viewing the federal and state actions based on the Bank's presale activities as frivolous, the Trustee declined to participate in either action. In the state court action, however, he was involuntarily joined as a party plaintiff. The Trustee later amended the state complaint to join the UCC claim. He was delightfully surprised with a two million dollar judgment in the state suit, and is now arguing vigorously that the federal district court injunction was an abuse of discretion.

In addition to arguing most of the issues previously addressed in this opinion, the Trustee also asserts that the BHCA judgment cannot be res judicata as to him, because he was not a party to that suit. The district court in this injunction proceeding found that the Trustee was bound by res judicata because he was in privity with the plaintiffs in the BHCA action. "Under the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the

suit is so closely aligned with his interests as to be his virtual representative." *Aerojet-General Corporation v. Askew,* 511 F.2d 710, 719 (5th cir.1975), *cert. denied,* 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975). "The question of whether a party's interests in a case are virtually representative of the interests of a non-party is one of fact for the trial court." 511 F.2d at 719.

The district court found that the Trustee was in privity with the Parsons as to all claims that were or should have been raised in the federal action and therefore the Trustee was barred by res judicata to the same extent as the Parsons. We may reverse the district court's findings of privity only if clearly erroneous.

A finding of privity is no more than a finding that all of the facts and circumstances justify a conclusion that non-party preclusion is proper. Wright, Miller, & Cooper, 18 Federal Practice and Procedure § 4459, at p. 418 (1981). "Modern decisions search directly for circumstances that justify preclusion... This process often leads to a conclusion that preclusion is justified as to some matters but not others." *Id.,* at p. 419. In order to determine whether the district court was clearly erroneous in its finding of privity we must examine the facts and circumstances surrounding both the fraud and the UCC claims.

A. THE FRAUD CLAIM

The district court found that the cause of action asserted in the BHCA action belonged primarily to Parsons-Montgomery. That corporation would have been entitled to all or part of the damages awarded if the Parsons had prevailed on the liability question. The Parsons' interests in the BHCA action were therefore virtually representative of Parsons-Montgomery. In determining that the Trustee for Parsons-Montgomery was also virtually represented by the Parsons in the BHCA action, the district court relied on *In re Four Corners Enterprises,* 17 B.R. 156 (Bkrtcy.M.D.Tenn.1982), which rejected the argument that a trustee in bankruptcy who was not a party to a federal action should not be barred by res judicata principles from bringing a

state court action. The district court opinion included the following quotation from *In re Four Corners:*

> The trustee was well aware of these proceedings (the prior federal action) and made no effort to intervene as an interested party. The trustee's inaction inveighs against now allowing him to relitigate the same issue previously decided in the federal district court proceeding. [citations omitted] Furthermore, the trustee has employed as attorney to pursue this action the same attorney who represented the Fields in their suit against the defendant in federal district court. Under these circumstances, the trustee cannot complain that he lacked a full and fair opportunity to litigate the issue in question at the federal district court proceeding. Collateral estoppel thus precludes the trustee from relitigating this issue. *Four Corners,* supra, at 160. (parenthetical expression added).

Also of value in this analysis is the district court's quotation taken from *Paradise v. Vogtlandishe Maschinen-Fabrik,* 99 F.2d 53, 55 (3rd Cir.1938):

> It is settled that a pending action will not abate merely because of the bankruptcy of the plaintiff. [citations omitted] In such a case the trustees in bankruptcy may either assume prosecution of the action with the court's approval, consent to its continued prosecution by the bankrupt for their benefit, or decline to prosecute it because it is likely to involve them in fruitless expense. [citations omitted] If the trustees decline or fail to prosecute the action the bankrupt may continue its prosecution to judgment. [citations omitted] Furthermore if the suit is thus continued by the bankrupt the trustees will be concluded by the judgment. [citation omitted].

The federal suit alleged that the Bank's actions in negotiating the loan and in "conspiring" with Michael Orange violated the BHCA. [The BHCA action was pending in federal court when

Parsons-Montgomery was adjudicated bankrupt.] The Trustee was aware of the federal court proceeding and was free to intervene on the bankrupt corporation's behalf. Instead, he declined to get involved because he felt the suit was frivolous and would be a waste of money for the unsecured creditors he represents. The facts that allegedly constituted a violation of the BHCA in the federal action were identical to the facts that allegedly constituted fraud in the state action, and, in both cases, the entity primarily wronged by the Bank's alleged activities was Parsons-Montgomery, the bankrupt corporation. The district court found that if recovery were warranted under either of these theories—BHCA or fraud—Parsons-Montgomery, and thus the Trustee, would be the party entitled to most of the damages. The district court therefore correctly found that the Trustee had an identity of interests with the plaintiffs in the BHCA action and that the Trustee was virtually represented by the Parsons as to the issues litigated in that action. As to the fraud claim, therefore, the district court did not err in its finding of privity. Since the fraud claim could and should have been raised in the federal action as an alternate theory of recovery for the same wrong, the Trustee is barred by res judicata from bringing the fraud claim in the state court.

B. THE UCC CLAIM

After the Trustee was involuntarily joined in the state action, and almost a year after the federal court judgment in the Bank's favor, the Trustee amended his complaint to include the UCC claim that the foreclosure sale was commercially unreasonable. Until that point in the litigation, the state action against the Bank was based on factual allegations which had been fully adjudicated in the BHCA action. With the addition of the UCC claim, however, the state action began to involve fact questions which the district court found were part of the federal complaint, but which were not reached in the federal litigation. The district court correctly held that the Parsons are barred from litigating the UCC claim in state court because they should have

raised it in the BHCA action. The unique facts of this case, however, cause us to be reluctant to automatically find the Trustee was in privity with the Parsons as to the UCC claim.

The district court found that the federal BHCA action and the state actions for fraud and commercial unreasonableness were based on the same factual allegations. The record clearly supports this finding as to the fraud claim. The record on appeal is insufficient however, to determine whether this finding is correct as to the UCC claim. As noted in footnote 11, *supra,* the record on appeal is not clear as to whether the claim of commercial unreasonableness rests on allegations of improprieties in the handling of the sale itself or whether it rests on the same allegations of pre-sale improprieties that formed the basis of the fraud and BHCA claims. As to the Parsons, this distinction is of no consequence—regardless of the basis of the UCC claim, the events leading up to the sale and the sale itself constituted a series of connected transactions, and the Parsons should have raised commercial unreasonableness in the federal action. We believe, however, that as to the Trustee, the basis of the UCC claim must be determined. A finding of privity as to one claim does not necessarily and automatically extend that finding to all claims. Since the Trustee was not a party to the federal action and since the reasonableness of the sale price was not adjudicated in that action, we believe that equity demands we examine the basis of the UCC claim in order to determine whether a finding of privity as to that claim is justified in light of the circumstances.

If the UCC claim merely alleges that improprieties involving the Bank and Michael Orange prior to the sale resulted in the receipt of an unfairly low price for the company's assets, then the district court was correct in finding privity and barring the Trustee from asserting the UCC claim in state court. The Bank has already been required to defend its relationship with Michael Orange and OSI, Inc. and its role in the events leading up to the sale. These are the facts underlying the BHCA and

fraud claims. The Trustee is in privity with the Parsons as to the adjudication of those facts and is bound by the federal adjudication of those matters.

If, however, the UCC claim is based on alleged improprieties connected with the conduct of the foreclosure sale itself (separate and apart from any of the events leading up to the sale), under the facts of this case equity dictates that the Trustee be allowed to pursue this narrow claim in state court. The record shows that the Trustee made a conscious decision not to join in the federal suit because the suit was based *solely* on a federal cause of action involving *solely* the pre-sale events, and the Trustee correctly believed the action to be without merit. He did not believe there was a meritorious action based on those facts and he did not voluntarily join the state court fraud action based on those same facts. When he was involuntarily joined in the state suit he raised the claim he did believe had merit—the state law UCC claim. Neither the reasonableness of the handling of the foreclosure sale nor the sufficiency of the sale price had been adjudicated in the federal action. Moreover, the claims originally pursued by the Parsons—the BHCA and the fraud claim—allowed the possibility of their recovering treble or punitive damages, respectively. The UCC claim presumably leads only to an award of damages amounting to the difference between a fair price for the company assets and the price actually received. The Parsons showed no interest in pursuing a UCC claim until it was added by the Trustee in the state court. Assuming that the Trustee's UCC claim is based on factual allegations different from those underlying the fraud and BHCA claims, the parties' interests were not so closely aligned as to say the Parsons virtually represented the Trustee as to this narrow claim that the Parsons did not raise in the federal action.

The above considerations lead us to conclude that the unique circumstances of this case do not justify preclusion of a UCC claim based on facts involving solely the conditions of the sale itself and the Trustee should not be found to be in privity with

the Parsons as to such a claim. A finding of privity in these circumstances would be clearly erroneous.

It is therefore necessary to remand the case for findings of fact regarding what allegations form the basis of the Trustee's UCC claim. If the UCC claim is found to be based solely on the actual handling of the foreclosure sale (method, time, place, manner, etc.), the injunction should be modified to allow the Trustee to pursue this claim. Forcing the Bank to litigate this particular issue is not as inequitable as allowing relitigation of the events leading up to the foreclosure sale, since facts involving the actual sale were not developed in the federal action. Because the state judgment was a general verdict, the district court's injunction against the enforcement of the entire judgment must stand. If the Trustee does have a separate cause of action based on the actual sale, he must pursue it in a separate proceeding.

We therefore hold that, in general the injunction was not an abuse of discretion. We remand the case[16] for further fact findings to determine whether the injunction should be modified to allow the Trustee to pursue his UCC claim based only on the actual foreclosure sale.

AFFIRMED IN PART and REMANDED IN PART, with costs of appeal assessed against appellants.

HILL, Circuit Judge, dissenting:

This case presents a thorny problem of federal and state court relations. The law in the area appears relatively unclear, and, with regard to many of the issues addressed in the majority's opinion, the Supreme Court has yet to afford us guidance. In-

---

[16] The remand of this case is for the narrow purpose of determining whether the Trustee should be barred from bringing his UCC action against the Bank. The injunction as it now stands is affirmed as to all other appellants in this case.

deed, the Supreme Court may choose to use this case to set forth more definite standards. In my view the majority's opinion presents the best case that may be made for upholding (in large part) the action of the district judge. Nevertheless, I dissent.

First, I do not agree with the majority's conclusion that the Anti-Injunction Act, 28 U.S.C. § 2283, implicitly amended the Full Faith and Credit Act, 28 U.S.C. § 1738. I see no reason why the two sections cannot be construed harmoniously. I would conclude that section 2283 allows the district court to enter an injunction, perhaps grounded in the concept of res judicata, unless the state court has already addressed teh res judicata issue on the merits. In cases in which the state court has reached the merits, I would hold that section 1738 requires the federal court to afford full faith and credit to the state court's resolution of the issue. It is the latter situation that presents itself in this case.

The majority notes that the construction I advocate might well lead to an unseemly "rush back to federal court for a res judicata ruling any time there was a possibility that a state court might rule on the issue first." Majority Opinion at note 12. Although this might well create a difficult problem, the courts have long tolerated simultaneous actions despite the inherent inefficiency of such a system. *See* 18 Wright, Miller & Cooper, Federal Practice & Procedure § 4404 at 22-23. It seems to me that the construction adopted by the majority allows the party in the position of the bank in this case to have two bites at the apple. After losing its attempt to assert the defense of res judicata in the state court, that party may go to the federal court. This scenario is at least as troublesome as the problem envisioned by the majority.

My views on this issue are substantially in accord with those of the authors of the Wright, Miller & Cooper Treatise on Federal Practice and Procedure:

> The principles of res judicata apply to preclude relitigation of the res judicata issue just as cogently as with any other issue, and perhaps even more cogently. As between separate systems of courts, it has been argued with great force that the full faith and credit issue should be open to reexamination in a third forum at the behest of a litigant who by unsuccessfully seeking review in the Supreme Court has exhausted the possibility of impartial review of a second decision that designs the res judicata effects of the first judgment. On balance, however, it seems better to deny such reexamination. The fundamental arguments for reexamination are that a state court cannot be entrusted with final competence to deny federal constitutional protections that are designed to protect against parochial state interests and that the Supreme Court cannot afford effective review in light of convening demands on its time. State court judgments have been given preclusive effect as to many other federal constitutional questions, however, and experience has not shown any apparent reason to be specially distrusting in this area. The general values of repose suggest that preclusion should attach to state adjudication of the full faith and credit issue just as to any other.

Id. § 4404 at 28-29 (footnote omitted).

Assuming, however, that the majority has correctly interpreted the effect of the Anti-Injunction Act on the Full Faith and Credit Act, I nevertheless disagree with the result. The majority correctly notes that "[w]ithin the limits of [its] discretion, a district court in a given case might go either way [granting or denying the injunction] and not be reversed." *Delta Air Lines v. McCoy Restaurants, Inc.*, 708 F.2d 582, 587 (11th Cir.1983). If the district judge has not abused his discretion in this case, however, I can envision no case in which the entry of an injunction would be improper. The state lawsuit and the federal lawsuit at issue here involve different parties and, arguably, dif-

ferent causes of action. Although the district judge no doubt resolved some of the factual disputes present in the state court action when he entered a directed verdict in the federal court action, the plaintiffs in that original case were unable to secure a review of his conclusions. On appeal, this court held that under no set of facts would the actions of the bank defendant violate the provisions of the Bank Holding Company Act. *See parsons Steel, Inc. v. First Alabama Bank of Montgomery,* 679 F.2d 242 (11th Cir.1982). And, as the majority correctly notes, the commercial reasonableness claims—the factual basis for which is unclear on the present record—wer enot pleaded at all in the federal action. As we recently stated in *Delta Air Lines:*

> Under the relitigation exception to the Anti-Injunction Act, however, a federal court may enjoin the state proceeding only if necessary to protect or effectuate its own judgment. . . . A federal court's judgment is presumably far more threatened if the state proceeding involves the same issues than if it involves only the issues that could have been, but were not, raised.

708 F.2d at 586.

Furthermore, in this case, the bank waited until the state court had reached judgment on both the res judicata issue and on the merits of the case before requesting an injunction from the federal district court. Although the majority would apparently disagree, it seems to me that such delay serves only further to complicate the relations between the state and federal courts. Barring an instance in which the bank waited to obtain an injunction from the federal court until after it had filed and prosecuted its state court appeal, I can envision no situation that is more likely to create discord and duplication of efforts than the one in this case.

My conclusion that the injunction was improperly issued is in spite of the fact that I tend to agree with the district court and my colleagues in the majority that the state court litigation repeated the federal court issues—or issues that could have been resolved there. Federalism, expressed in 28 U.S.C. § 1738, requires us to accord full faith and credit to judgments with which we may not agree, or else it requires nothing at all. For these reasons, I would reverse the judgment of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 83-V-181-N

First Alabama Bank of
Montgomery, N.A.; et al,
Plaintiffs,

vs.

Parsons Steel, Inc.; et al,
Defendants.

OPINION

This cause is submitted on the pleadings and evidence before the Court for an injunction against prosecution of a judgment and proceeding in the Courts of the State of Alabama on the bases of res judicata and collateral estoppel. Plaintiffs, First Alabama Bank and its Vice-President Edward Herbert, insist that this Court has heretofore found in favor of Plaintiff Bank [Defendant in an earlier suit in this Court, *Parsons Steel, Inc., et al v. First Alabama Bank of Montgomery, N.A.*, 679 F.2d 242 (11th Cir. 1982)] based on substantially the same factual allegations and that some Defendants herein [Plaintiffs in the prior suit in this Court and in the current State Court suit] sought to split their causes of action and sue in the federal court for violation of the Bank Holding Company Act [12 U.S.C. §§ 1971, *et seq.*] and in the State court for common law fraud and commercial unreasonableness. The federal court action proceeded to the earlier judgment, the same being in favor of Defendant Bank, and the State court action resulted in a judgment for the assorted Plaintiffs for $4,000,001.00 against the Defendants. The State court action is now pending before State appellate courts. The Plaintiffs insist that this Court, pursuant

to 28 U.S.C. § 2283, has jurisdiction and should exercise the same to protect or effectuate their judgment. The Defendants insist that 28 U.S.C. § 2283 proscribes this suit.

Authorities are well documented that identical parties may not relitigate identical issues in separate courts. A very large part of the costs of litigation is on the public, and the courts, as well as the public, are interested in avoiding multiplicity of litigation under the doctrine of res judicata and other principles of law. This does not mean that every cause of action in existence between parties must necessarily be litigated at the same time. See, *Bragg v. Jim Skinner Ford,* 17 A.B.R. 1412, indicating that purchaser of a car might sue in separate lawsuits for failure to disclose financing terms under the Truth-in-Lending Act, 15 U.S.C. § 1631, and later sue for breach of warranties on the sale of the automobile. However, as pointed out by the United States Court of Appeals for the Fifth Circuit in *Meridian Investing & Dev. Corp. v. Sunco Highland Corp.,* 628 F.2d 370, 372, a federal district court "may not abdicate its authority or duty in favor of State jurisdiction," even though federal courts are most reluctant to encroach on State court jurisdiction. See, also, *Ermentrout v. Commonwealth Oil Co.,* 220 F.2d 527, 530 (5th Cir. 1955). In short, it is clear that the same causes of action may not be litigated a second time between the same parties after final judgment on one or the other proceedings.

A slightly different question arises in a situation where different causes of action arising from the same factual circumstances are alleged in a second suit. The United States Court of Appeals for the Fifth Circuit seems to clearly answer this proposition in *Woods Exploration & Tro. Co. v. Aluminum Co. of America,* 438 F.2d 1286, 1315 (5th Cir. 1971), cert.den. 404 U.S. 1047 (1972):

> "The principle of res judicata, enforceable by injunction, would thus preclude relitigation in the state following this

> federal judgment if the state and federal courts involve substantially the same wrongs measured by similar standards of liability so that recovery in the federal suit will have compensated plaintiffs for the total harm suffered ***. Alternatively, even if different standards of recovery existed in the state and federal actions, res judicata would be applicable if plaintiffs were afforded an opportunity to allege the state grounds which constituted the same cause of action in the federal proceedings ***. Focusing on the latter test, we think that the doctrine of pendent jurisdiction *** afforded plaintiffs opportunity for joinder."

As articulated in *Harper Plastics v. Amoco Chemical Corp.*, 657 F.2d 939, 945 (7th Cir. 1981), "res judicata operates to prevent the splitting of a single cause of action and the use of several grounds of recovery under the same action as the basis for separate suits." See, also, *Baltimore S. S. Co. v. Phillips,* 274 U.S. 316, 320 (1926), recognizing that there must be an end to litigation. Plaintiffs in the original suit in this Court sued under the Bank Holding Company Act and proceeded to attempt to show that the Bank, by promising unlimited credit, induced the various Parsons entities to overextend their credit; that the Bank on threat of denying further credit forced Parsons Montgomery to employ Orange as manager; and that, thereafter, the Bank foreclosed its mortgage on Parsons' property and sold for commercially unreasonable prices.[1] The promise to finance, offered as evidence of the preamble to the alle-

---

[1] Plaintiffs' objective was to show that the Bank required unusual services or actions of the creditor as a condition of making a loan, all being in violation of the Bank Holding Company Act. Plaintiffs insisted that the unusual services required were that Mr. Orange, a former customer of the Bank, be employed as manager of Parsons Montgomery and that he be given a right to buy controlling ownership of the corporation. This Court, and ultimately the Court of Appeals for the Eleventh Circuit, concluded that the Bank had not required any unusual banking practice, and judgment was entered for the Bank.

ed Bank Holding Company Act violation in federal court, is alleged as a fraud in the State court. The mortgage foreclosure sale for commercially unreasonable prices appeared in the federal case as evidence of damages and in the State case as a violation of CODE OF ALABAMA, §§ 7-9-504, 7-9-507. Section 7-9-504 provides that every aspect of disposition of security for a loan upon foreclosure "must be commercially reasonable", and §7-9-507 provides a cause of action "*** to recover from the secured party any loss caused by a failure to comply with ***" § 7-9-504. Evidence of the participation of Herbert, Orange and O.S.I., Inc., was offered in the federal trial as tending to show a conspiracy by the Bank with those parties to take advantage of the Parsons. This conspiracy could and should have been pleaded in the federal proceeding by the Plaintiffs.

Paragraph 40 of the federal complaint and Paragraph 38 of the State complaint indicate that damages claimed to have been caused by the alleged wrongs in each suit are substantially the same. It would, therefore, appear that, in the words of *Woods,* supra, "recovery in the federal suit [would] have compensated plaintiffs for the total harm suffered," and "plaintiffs were afforded an opportunity to allege the state grounds which constituted the same cause of action in the federal proceedings." As shown in *United Mine Workers v. Gibbs,* 383 U.S. 715, a federal court has power to hear State claims if it has subject matter jurisdiction of the federal claim and if the State claims arise from "a common nucleus of supportive fact" so that plaintiff would ordinarily be expected to try them in one proceeding. The doctrine of pendent jurisdiction afforded Parsons an opportunity for that joinder. Instead, they chose to split the alleged wrongs with the apparent scheme of relitigating the matter in the event of an adverse decision in the first court.

The United States Court of Appeals for the Fifth Circuit, as recently as April 1, 1983, set out the law applicable also to this Circuit, absent showing to the contrary, in the case of *Nilsen v. The City of Moss Point, Miss.,* 701 F.2d 556, at 560, as follows:

> "And it is equally settled that one who has choice of more than one remedy for a given wrong, *** may not assert them serially, in successive actions, but must advance all at once on pain of bar."

In *Nilsen* the plaintiff had filed suit under 42 U.S.C. § 1983 to recover in a sex discrimination suit for which relief had already been denied her in a suit claiming a parallel remedy under the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq*. Relief under § 2000e had been denied the plaintiff because suit under that section was barred by the statute of limitations. The Court reasoned that the decision was on the merits and that the plaintiff was barred from proceeding in the second suit because of her unexplained dilatoriness in not pleading in the same proceeding all causes of action arising from the same set of facts.

Mr. and Mrs. Parsons and Parsons Steel, Inc., were parties to the federal proceeding against the Bank. The complaint was that the Bank acted through its Vice-President, Edward Herbert. Herbert was in privity with the Bank, and his wrong, if any, should have been charged in the federal court proceeding. It, therefore, appears that the Plaintiffs in the federal suit - Mr. and Mrs. Parsons and Parsons Steel, Inc. - should have been barred from maintaining the suit in the Circuit Court of Montgomery County, Alabama, upon issuance of the judgment of this Court in the suit filed by them against the First Alabama Bank and Mr. Herbert.

However, a fourth plaintiff, A. Pope Gordon, Trustee of the Bankrupt Corporation Parsons Steel Industries (Parsons Montgomery), was not a party to the federal court proceedings and may not be barred by the doctrine of res judicata unless Mr. Gordon, as Trustee, was privy to the parties in the original proceeding. This Court notes from depositions in the file of this Court, of which this Court may take judicial knowledge, that Trustee Gordon was represented by attorneys who participated in the taking of depositions which contained stipulations that the depositions could be used in both the State and federal

cases. See the deposition of Hon. Luther H. Waller, Jr., taken on January 28, 1980. Mr. Waller's deposition shows that the attorney for Trustee Gordon actually participated in the deposition, and Trustee Gordon could hardly argue that he did not have notice of the federal court proceeding under such circumstances. The United States Court of Appeals for the Seventh Circuit, in discussing the inter-relationship between 28 U.S.C. § 2283(the Anti-Injunction Act), the doctrine of res judicata and the doctrine of collateral estoppel, makes the following statement:

> "The 'effectuate its judgments' exception was added in 1948 to permit a federal court to enjoin relitigation in a state court of a matter determined by a judgment of the federal court, thus abrogating *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100 (1941). 28 U.S.C.A. § 2283, Revisor's Note; 1A, Part 2 J. Moore, *Federal Practice* ¶ 0.208[2]-[3] (2d ed. 1974); *Doe v. Ceci,* 517 F.2d 1203, 1207 (7th Cir. 1975). As Justice Reed said in his *Toucey* dissent, the alternative to allowing such injunctions 'is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of *res judicata* which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication.' 314 U.S. at 144, 62 S.Ct. 149.
>
> "The relitigation exception of § 2283 applies not only when the prior federal judgment is *res judicata* but also when the doctrine of collateral estoppel, or issue preclusion, is relied upon. *International Association of Machinists v. Nix,* 512 F.2d 125, 132 (5th Cir. 1975). We have even applied it to preclude an ancillary claim that could have been, but was not, asserted in the federal action, *Lee v. Terminal Transport Co.*, 282 F.2d 805, 807

(7th Cir. 1960), *cert.denied,* 365 U.S. 828, 81 S.Ct. 713, 5 L.Ed.2d 705 (1961), ***." *Samuel C. Ennis & Co. v. Woodmar Realty Co.,* 542 F.2d 45, 49 (7th Cir. 1976).

The *Ennis* case overruled the denial of an injunction by a district judge. The Appellate Court held that a trustee in bankruptcy and various other participants in a bankruptcy proceeding were entitled to federal injunctive relief against State action to preclude relitigation of issues decided in their favor by the Bankruptcy Court, as were individuals who, though not parties to the bankruptcy, were either attorneys for parties or did business with the bankrupt estate by buying real estate or arranging sales, as such parties were entitled to assert collateral estoppel, or issue preclusion, as to issues sought to be relitigated in the State action.

> "[T]he bankrupt, Woodmar Realty Company, an appellee here, was represented by Attorney Owen W. Crumpacker, the other appellee here. More than five years after the termination of the proceeding (in bankruptcy), Woodmar, represented by the same attorney, filed a damage suit in an Indiana state court charging the trustee in bankruptcy and various other participants in the bankruptcy proceeding with perpetrating a fraud on the bankruptcy court. The defendants in that action, after first moving to dismiss it, filed this federal action against appellees seeking to enjoin the state action. The District Court dismissed this action on the ground that 28 U.S.C. § 2283 forbids the relief sought." (parenthetical expression added). *Ennis,* supra, at 46-47. The Court of Appeals reversed the District Court.

Ennis incidentally rejected the principle of waiver or estoppel of the right to assert the defense of res judicata because of a delay of one year in asserting the same after bringing of the State Court action under circumstances similar to these. In *Ultracashmere House, Ltd. v. Meyer,* 664 F.2d 1176 (1981), a case heavily relied upon by the Parsons to defeat an injunction,

the Court of Appeals affirmed Judge Hobbs' denial of a stay of State Court proceedings, 88 F.R.D. 359. That case accurately states the law[2] pertinent to this type of case, but the facts and the result vary considerably from this case. The District Court recognized that the nonresident (1) had a right, and declined, to remove the litigation to federal court when it was first filed, (2) disregarded the trial court's order, and (3) suffered adverse determination of all issues except the amount of damages before seeking a haven in federal court. Here, the Parsons suffered a federal court judgment before the State court trial. The Defendant in that State court, having by-passed federal removal but having found State court distasteful, sought by injunction to obtain the effective removal so as to relitigate the liability found against it in the State court. To have allowed such relief to Plaintiffs in that case would, in effect, have defeated the purpose of the doctrine of res judicata and would have encouraged every non-resident to sample the climate of State litigation before deciding whether or not to seek a federal hearing. The trial judge assumed, arguendo, that he had discretion to grant the stay but declined to exercise the discretion to relitigate issues decided in the State court. In the instant case, the State court failed to show the same comity to this Court.

---

[2] "Where a federal court is asked to interfere with pending state court proceedings, it must proceed with caution, taking into account general considerations of federalism and, in particular, likelihood of seriously disrupting the legitimate functioning of the judicial system of state." *Ultracashmere House, Ltd. v. Meyer,* 664 F.2d 1176, 1177.

"*** res judicata precludes relitigation of an action were four 'essential elements' are satisfied: (1) a prior judgment has been rendered by a court of competent jurisdiction; (2) there is substantial identity of the parties in the two suits; (3) there is identity of issues in the two suits; and (4) the prior judgment was rendered on the merits. *Ozley v. Guthrie,* 372 So.2d 860, 861 (Ala. 1979)(citing *Wheeler v. First Alabama Bank of Birmingham,* 364 So.2d 1190 (Ala. 1978)). 'Where these elements are present ... the former judgment is an absolute bar to any subsequent suit on the same cause of action, including any issue which was or could have been litigated in the prior action.' *Ozley,* supra, at 861 (citing *McGruder v. B & L Construction Co.,* 331 So.2d 257 (Ala. 1976)).***." *Ultracashmere,* supra, at 1183-84.

An argument by another trustee in bankruptcy, that he was not a party to a federal action and, therefore, should not be barred from bringing a State court action by the principles of res judicata and collateral estoppel, was rejected by a bankruptcy court. *In re Four Corners Enterprises,* 17 B.R. 156 (M.D. Tenn. 1982). In *Four Corners,* creditors and former majority shareholders of the debtor corporation sued the sole shareholder of the debtor corporation to recover on a promissory note. The defense in the federal court was that the note was an obligation of the corporation only and not of the sole shareholder thereof. The plaintiffs in *Four Corners* countered by contending that the stockholder was personally liable because he had operated the corporation as its alter ego. The court found against the plaintiffs and dismissed the case. Subsequently, the trustee of the debtor corporation brought an action against the sole stockholder to charge him personally liable for the corporate debts. The court held that this attempt at relitigation was barred under the doctrine of collateral estoppel, by the prior litigation of the former stockholders of the debtor corporation, stating the following:

> "The trustee was well aware of these proceedings (the prior federal action) and made no effort to intervene as an interested party. The trustee's inaction inveighs against now allowing him to relitigate the same issue previously decided in the federal district court proceeding. [citations omitted] Furthermore, the trustee has employed as attorney to pursue this action the same attorney who represented the Fields in their suit against the defendant in federal district court. Under these circumstances, the trustee cannot complain that he lacked a full and fair opportunity to litigate the issue in question at the federal district court proceeding. Collateral estoppel thus precludes the trustee from relitigating this issue." *Four Corners,* supra, at 160. (parenthetical expression added).

The relative positions of the trustee and the bankrupt are discussed in *Paradise v. Vogtlandische Maschinen-Fabrik*, 99 F.2d 53, 55 (3rd Cir. 1938), wherein the court said:

> "It is settled that a pending action will not abate merely because of the bankruptcy of the plaintiff. [citations omitted] In such a case the trustees in bankruptcy may either assume prosecution of the action with the court's approval, consent to its continued prosecution by the bankrupt for their benefit, or decline to prosecute it because it is likely to involve them in fruitless expense. [citations omitted] If the trustees decline or fail to prosecute the action the bankrupt may continue its prosecution to judgment. [citations omitted] Furthermore if the suit is thus continued by the bankrupt the trustees will be concluded by the judgment. [citation omitted]."

A trustee in bankruptcy would also be precluded from relitigation by a judgment in a case wherein he should and could have been made a party to assert the trustee's rights but elected not to do so.

Parsons rely, for their contention that the Trustee could not have intervened in the federal proceeding, upon *Blake v. Pullen*, 554 F.2d 947, to the effect that permissive intervention under Rule 24 must be supported by independent jurisdictional grounds. The damages sought by Parsons against the Bank in the federal court speifically involved damages allegedly done to Mr. and Mrs. Parsons and their almost wholly-owned corporation (Parsons Mobile) allegedly as a proximate result of dealing between the Bank, acting through its Vice-President Herbert, and its debtor, Parsons Montgomery, acting through Mr. Parsons and, to some extent, Mrs. Parsons, who pledged some of the property of Parsons Mobile for security. Viewing the barebone, though complicated, pleadings in retrospect, this Court is now firmly of the opinion that Parsons Montgomery (more properly its Trustee in Bankruptcy) was the primary, if not sole, party damaged by the alleged violation of the Bank

Holding Company Act. Parsons Mobile was primarily damaged by damage to its wholly-owned subsidiary, and Mr. and Mrs. Parsons, as controlling stockholders in Parsons Mobile, were damaged largely because of the bankruptcy of the subsidiary, Parsons Montgomery. This Court is firmly of the opinion that any right of the creditors of Parsons Montgomery could have been asserted in the federal proceeding. The Trustee had the option to join in that suit or to await a judgment, if any, and assert the creditors' rights against the stockholders of the bankrupt corporation if they had been successful in the federal action. The Trustee, viewing both the federal and the State proceedings as a waste of effort, declined to join or did not consider joining in either. The Trustee was joined in the State court proceeding involuntarily on motion of the Bank. While the jury disagreed, the wisdom of the Trustee's reluctance to expend the creditors' money in processing these two complaints is understandable to this Court. Once the defects of the Bank Holding Company Act claim, obscured by barebone pleadings were clarified by the evidence, the failure of the federal claim was assured, even though the claim was vaguely substantial enough to give federal jurisdiction of State claims arising from the common nucleus of supporting facts. The decision not to subject the creditors to the expense of prosecuting the State claims arose from reasonable concerns: (1) the fraud claim arose from Parsons' claimn that the Bank fraudulently promised him unlimited credit - one who has dealt with banks would doubt that a jury would believe that unlimited credit would be promised to anyone by any reputable banker; (2) the claim for sale of secured property at a commercially unreasonable price was hardly an enviable plaintiff's case when Parsons admitted the debt and had an opportunity to secure a better sales price; and (3) the claims for violation of fiduciary relationships, when both the Bank and Orange appeared to operate at arms-length in business relationships with the Parsons' entities in situations where everyone hoped to prosper, hardly appeared to offer great hope. This Court is of the opinion that the Trustee had

reasonable cause to be unimpressed with the Parsons' chances of success.

This Court is of the opinion (1) that the State Circuit Court, in trying an identical set of facts to those previously tried in this Court, has disregarded, and is disregarding, the final judgment of this Court over timely filed defenses of res judicata and collateral estoppel; (2) that, when those defenses were filed, the complicated pleadings obscured the similarity of proceeding and privy of parties from a State trial court unfamiliar with the prior litigation in this Court; and (3) that to allow a continuation of the State court proceedings in another State court would simply complicate the wrong. The public itself, as well as the parties, is interested in deterring relitigation of suits and no individual may waive the public interest. The Bank's reasons for relitigating in the State court before seeking relief from this Court can only be imagined, but Defendants did everything possible in the State court to demonstrate applicability of the doctrines of res judicata and collateral estoppel before returning to this Court. The pleadings were complicated, and the claims of the Plaintiffs were vague. This Court, having considered the same transactions, can understand the problem of proving without a trial those defenses to a court unfamiliar with the federal case. This Court is, therefore, of the opinion that neither waiver nor estoppel will bar Plaintiffs' bringing this suit to bar further relitigation of proceedings already decided in this Court.

Judgment with costs will be entered for the Plaintiffs, and the Defendants will be enjoined from further prosecution of the case entitled *parsons Steel Industries, Inc., et al v. First Alabama Bank of Montgomery, N.A., et al,* Civil Action No. CV-79-179-G, in the Circuit Court of Montgomery County, Alabama.

DONE this 15th day of June, 1983.

United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-7395

First Alabama Bank Of Montgomery, N.A.,
and Edward Herbert,
Plaintiffs-Appellees,

versus

Parsons Steel, Inc., et al.,
Defendants,

A. Pope Gordon, Trustee in Bankruptcy for the Estate
of Parsons Steel Industries, Inc., Parsons Steel, Inc.,
Jim D. Parsons and Melba L. Parsons,
Defendants-Appellants.

Appeal from the United States District Court for the
Middle District of Alabama

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion December 4, 1984, 11th Cir., 198__, ____ F.2d ____).
(January 14, 1985)

Before GODBOLD, Chief Judge, HILL, Circuit Judge, and THORNBERRY*, Senior Circuit Judge.

PER CURIAM:

---

* Honorable Homer Thornberry, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

(X) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this casue en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Homer Thornberry
United States Circuit Judge

Office-Supreme Court, U.S.
FILED
MAY 2 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1616

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PARSONS STEEL, INC., JIM D. PARSONS, MELBA L. PARSONS; and A. POPE GORDON, Trustee in Bankruptcy for the Estate of PARSONS STEEL INDUSTRIES, INC.,

Petitioners,

vs.

FIRST ALABAMA BANK OF MONTGOMERY, N. A., and EDWARD HERBERT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

M. ROLAND NACHMAN, JR.
(Counsel of Record)
JAMES A. BYRAM, JR.
STEINER, CRUM & BAKER
P. O. Box 668
Montgomery, Alabama 36101
(205) 832-8800

Attorneys for Respondents

St. Louis Law Printing Co., Inc. 1477

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Did the court below correctly affirm a district court injunction staying proceedings in a state court action in the following circumstances:

The district court found that an action there under the Bank Holding Company Act (12 USC § 1972) and a state court action were based on the same factual allegations and substantially the same damages claim. After a federal judgment in favor of respondent bank, petitioners sought to relitigate substantially identical matters in the state action. Because the state judgment in effect nullified the earlier federal one, the district court, pursuant to 28 USC § 2283, enjoined further prosecution of the state court action in order to protect and effectuate its prior judgment.

2. Did the court below correctly affirm the district court's inclusion in the scope of this injunction of a state court party—by choice not a party to the federal action—upon a factual finding of privity and adequate representation?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Authorities	iii
Opinion Below	1
Jurisdiction	1
Statutes and Constitutional Provisions Involved	2
Statement of the Case	2
Reasons for Denying the Writ	5
Conclusion	10
Certificate of Service	10
Appendix A	A-1

TABLE OF AUTHORITIES

Cases:

A.C.L.R.Co. v. Brotherhood, 398 U.S. 281	7
Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975), *cert. denied,* 423 U.S. 908	8
Allied Mutual Ins. Co. v. Roberson, 306 F.2d 130 (4th Cir. 1962)	7
Bank of Heflin v. Miles, 621 F.2d 108 (5th Cir. 1980)	7
Brotherhood v. Bangor and Aroostook R. Co., 389 U.S. 327	5

Brown v. Felsen, 442 U.S. 127 8

Brown v. McCormick, 608 F.2d 410 (10th Cir. 1979) ... 8

California v. Taylor, 353 U.S. 553 9

Capital Cities Cables v. Crisp, 467 U.S. ____, 81 L.Ed. 2d 580 9

Donelon v. New Orleans Terminal Co., 474 F.2d 1108 (5th Cir. 1973), *cert. denied,* 414 U.S. 855 8

First Alabama Bank of Montgomery, N.A., et al. v. Parsons Steel, Inc., et al., 747 F.2d 1367 (11th Cir. 1984) ..... *passim*

General Foods v. Mass. Dept. of Health, 648 F.2d 784 (1st Cir. 1981) 9

Harper Plastics v. Amoco Chemicals Corp., 657 F.2d 939 (7th Cir. 1981) 8

In re Corrugated Container Antitrust Litigation, 659 F.2d 1332 (5th Cir. 1981), *cert. denied,* 456 U.S. 756 7

Marrese v. American Academy of Orthopaedic Surgeons, ____ U.S. ____, 53 U.S.L.W. 4265 8

Meridian Investing Development Corp. v. Suncoast Highland Corp., 628 F.2d 370 (5th Cir. 1980) 7

Mitchum v. Foster, 407 U.S. 225 7

Montana v. United States, 440 U.S. 147 9

Seaboard System R. Co. v. Union Camp Corp., 613 F.2d 604 (5th Cir. 1980), *cert. denied,* 449 U.S. 835 7

Southwest Airlines Co. v. Texas International Airlines, Inc., 546 F.2d 84 (5th Cir. 1977), *cert. denied,* 434 U.S. 832 8

Silcox v. United Trucking Service, 687 F.2d 848 (6th Cir. 1982) 8

Tennessee v. Dunlap, 426 U.S. 312 9

Toucey v. New York Life, 314 U.S. 118 ..... 5, 6

United States v. District of Columbia, 654 F.2d 802 (D.C. Cir. 1981), *cert. denied,* 454 U.S. 1082 7

United States v. Amer. Society of Composers, etc., 442 F.2d 601 (2nd Cir. 1971) 7

Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 7

Wood v. Santa Barbara Chamber of Commerce, 705 F.2d 1515 (9th Cir. 1983), *cert. denied,* 104 S.Ct. 1446 8

Woods Exploration & Pro. Co. v. Aluminum Co. of Amer., 438 F.2d 1286 ..... 7, 8

Constitution and Statutes:

Constitution of the United States, Fifth Amendment ... 2

12 U.S.C. § 1972 ..... i, 3

28 U.S.C. § 1254 2

28 U.S.C. § 2283 ..... *passim*

Miscellaneous:

Note, *Federal Power to Enjoin State Court Proceedings,* 74 Harv. L. Rev. 726 7

Rule 52(a) F.R.C.P. 2

No. 84-1616

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PARSONS STEEL, INC., JIM D. PARSONS, MELBA L. PARSONS; and A. POPE GORDON, Trustee in Bankruptcy for the Estate of PARSONS STEEL INDUSTRIES, INC.,

Petitioners,

VS.

FIRST ALABAMA BANK OF MONTGOMERY, N. A., and EDWARD HERBERT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 747 F.2d 1367 (11th Cir. 1984). It appears as Appendix A to the petition.

JURISDICTION

Although the petition does not contain all relevant dates, Respondents understand that the petition was filed on April 12,

1984 within 90 days of January 14, 1985 the date of the denial of the petition for rehearing below. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Relevant provisions of 28 U.S.C. § 2283 are contained in the petition. The relevant portion of Rule 52(a) F.R.C.P. is also involved.[1] Although the petition asserts that the due process clause of the Fifth Amendment of the United States Constitution is involved, this issue was not presented below.

STATEMENT OF THE CASE

Respondent refers to the majority opinion of the court of appeals below which appears in petitioners' appendix and which is reported at 747 F.2d 1367.

Moreover, that opinion shows as does the opinion of the district court of March 29, 1985, Appendix A to this brief, that the court of appeals remanded, as to the petitioner trustee, to permit the district court to determine whether its injunction "should be modified to allow the Trustee to pursue his UCC claim based only on the actual foreclosure sale."[2] Upon remandment the district court, after having given the trustee an opportunity to submit facts, held that its injunction should not be modified "to allow the Trustee to pursue his UCC claim because that claim is based on matters heretofore litigated by this Court, and the Trustee was privy to such litigation." (A-10)

---

[1] "...Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses...."

[2] 747 F.2d 1381; A-26 of petition.

The petition states (p. 3) that the earlier federal action "alleged only" that Bank had placed an impermissible condition on a further extension of credit in violation of the Bank Holding Company Act (BHCA) 12 U.S.C. § 1972. This statement is erroneous and is negated by the extensive factual recitations of the court of appeals and the district court. The district court, for example, held that "an identical set of facts to those previously tried in this Court" was tried in the later state court proceedings;[3] and the court of appeals approved these findings.[4] Even the dissenting judge below agreed with the district court and the majority "that the state court litigation repeated the federal court issues—or issues that could have been resolved there."[5]

Petitioners mislead when they assert that respondents did not seek to join trustee as a party to the earlier federal action. (p. 4) The court of appeals and the district court found that the trustee "chose not to participate in the [earlier federal] suit;"[6] and

---

[3] A-42 of petition.

[4] 747 F.2d at 1370; A-5 of petition.

"In a well reasoned opinion the federal district court found that the federal BHCA action and the state action were based on the same factual allegations and the damages claimed in each suit were substantially the same. The district court held that any additional state claims relating to the fact situation could have, and should have been raised in federal court under the doctrine of pendent jurisdiction. The BHCA action was therefore res judicata as to the state action. Because the state court judgment in effect nullified the federal court judgment in favor of the Bank, the federal court, pursuant to 28 U.S.C. § 2283, enjoined further prosecution of the state court action in order to protect or effectuate its prior judgment." (Footnote omitted.)

[5] 747 F.2d at 1382; A-30 of petition.

[6] 747 F.2d at 1370; A-3 of petition.

noted that his decision was because of his view that the federal and state actions "based on the Bank's presale activities [were] frivolous."[7]

In a remarkable error, petitioners assert (p.5) that the district court "made no finding that the injunction was necessary to 'protect or effectuate' its prior judgment but instead based the injunction solely on its conclusion that the Federal Action barred the State Action although clearly recognizing the two actions involved different causes of action." This statement is wholly inaccurate and recurs (e.g. pp. 16 and 18). The district court issued its injunction "to bar further relitigation of proceedings already decided in this Court"; and noted the public interest "in deterring relitigation of suits."[8] Moreover, as already noted, the court of appeals held that the district court issued its injunction "to protect or effectuate its prior judgment," because the state court judgment "nullified" the earlier federal court judgment.[9]

Exacerbating this inaccuracy, petitioners argue (p.5, n.2) that the court of appeals majority, in a unique decision, held that § 2283 was an exception to the full faith and credit act. The actual holding below was that, although § 2283 generally prohibited injunctions to stay proceedings in a state court, Congress had conferred that power on federal courts—as an exception to this prohibition—when it enacted the relitigation exception in 1948; and "while a federal court is generally bound by other state court determinations, the relitigation exception empowers a federal court to be the final adjudicator as to the res judicata effects of its prior judgments on a subsequent state action."[10]

---

[7] 747 F.2d at 1378; A-20 of petition.

[8] A-42 of petition.

[9] *Supra*, n. 4

[10] 747 F.2d at 1376; A-16 of petition.

REASONS FOR DENYING THE WRIT

1. Petitioners have filed a joint petition; a portion of the decision below which the trustee seeks to review was remanded by the court below; and the district court has conducted further proceedings and entered a subsequent order on March 29, 1985. In these circumstances, after a remand, this Court has denied certiorari because "the case is not yet ripe for review." *Brotherhood v. Bangor and Aroostook R. Co.*, 389 U.S. 327, 328 and authority cited.

2. Petitioners have failed to present any "special or important reasons" for the grant of certiorari and have failed to invoke any of the criteria specified in Supreme Court Rule 17.1(a) and (c); there is no conflict with a decision of another federal court of appeals; there is no suggested departure "from the accepted and usual course of judicial proceedings;" and the decision below accords with applicable decisions of this Court.

The courts below have applied the relitigation exception of § 2283 in a classic context—to effectuate the earlier judgment of the district court; to enjoin its attempted nullification by a later state court judgment; and thus to safeguard to the victor in the earlier federal litigation the fruits of that victory. This is precisely why congress enacted this exception to § 2283 in 1948, namely, to assure by express legislative language, that federal courts have the power to enjoin proceedings in a state court "to protect or effectuate" their judgments. As the code reviser has noted, Congress intended to adopt, by this legislation, the position of the "vigorous dissenting opinion" in *Toucey v. New York Life*, 314 U.S. 118, 144.[11]

---

[11] So characterized by Congress which adopted it when it reversed the majority by the enactment of § 2283. See Reviser's Notes. The majority opinion was thus characterized by the "vigorous" dissenting opinion (314 U.S. at 144):

> "This alternative is that a federal judgment entered perhaps after years of expense in money and energy and after the produc-

Petitioners erroneously assert that when federal courts determine whether an injunction against state proceedings is necessary to "protect or effectuate their judgment," they impermissibly review state court judgments and thus impinge on the exclusive power of this Court. This argument is wholly without merit. Courts and commentators have often described the process Congress had in mind to safeguard the effect of federal court judgments.

> "The Revisor's Note makes clear that this language allows a federal court to enjoin a state court's attempt to relitigate a federal decision, and the lower federal courts have so interpreted it. This is a sensible solution to the problem of relitigation of federal decisions; it prevents multiple litigation of the same cause of action and it assures the winner in a federal court that he will not be deprived of the fruits of his victory by a later contrary state judgment which the Supreme Court may or may not decide to review. Although a strict interpretation of the anti-injunction statute appeared proper to the Court in *Toucey,* that decision left federal judgments open to state court reversals. Since appeal of right no longer exists from a state court's failure to give res judicata effect to a federal decision, and since the Supreme Court's decisions to grant writs of certiorari are based more upon considerations of general public interest than of the interests of the individual litigants, interlocutory review of state court action by in-

---

tion of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of res judicata which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication. We, too, desire that the difficulties innate in the federal system of government may be smoothed away without a clash of sovereignties but we find no cause for alarm in affirming a court which forbids parties bound by its decree to fight the battle over on another day and field."

junction seems a satisfactory mode of protecting federal judgments."[12]

This Court has expressly recognized that Congress, when it enacted the "relitigation exception" to § 2283, had legislated so as to permit "a federal court to enjoin relitigation in a state court of issues already decided in federal litigation." *Mitchum v. Foster,* 407 U.S. 225, 235. See also this Court's discussion in *Vendo Co. v. Lektro-Vend Corp.,* 433 U.S. 623, 630 et seq.

Moreover, the decisions below do not contravene *A.C.L.R.Co. v. Brotherhood,* 398 U.S. 281, as petitioners erroneously suggest. This Court has repeatedly made plain that this case simply holds that federal courts do not have *inherent* power to enjoin state proceedings but must abide by the *express* exceptions to § 2283.[13] The injunction at bar was premised upon the specific relitigation exception in § 2283, and not upon any asserted inherent power of the federal court.

A long line of federal decisions accord with the decision below.[14]

---

[12] Note, *Federal Power to Enjoin State Court Proceedings,* 74 Harv. L. Rev. 726, 734, cited in *Woods Exploration & Pro. Co. v. Aluminum Co. of Amer.,* 438 F.2d 1286, 1312-1313 (5th Cir. 1971).

[13] See discussion in *Mitchum v. Foster, supra.* and *Vendo Co. v. Lektro-Vend Corp., supra.*

[14] *United States v. District of Columbia,* 654 F.2d 802 (D.C. Cir. 1981), *cert. denied,* 454 U.S. 1082; *United States v. Amer. Society of Composers etc.,* 442 F.2d 601 (2nd Cir. 1971); *Allied Mutual Ins. Co. v. Roberson,* 306 F.2d 130 (4th Cir. 1962); *In re Corrugated Container Antitrust Litigation,* 659 F.2d 1332 (5th Cir. 1981), *cert. denied* 456 U.S. 756; *Meridian Investing Development Corp. v. Suncoast Highland Corp.,* 628 F.2d 370 (5th Cir. 1980; *Bank of Heflin v. Miles,* 621 F.2d 108 (5th Cir. 1980); *Seaboard System R. Co. v. Union Camp Corp.,* 613 F.2d 604 (5th Cir. 1980), *cert. denied* 449 U.S. 835;

Petitioners cite many cases (pp. 11-15) which discuss the preclusive effect in federal courts of earlier state court decisions. The short answer is that these cases—as the questions presented by petitioners for review—are simply irrelevant to the issue in this case, namely, the authority of a federal court, under § 2283, to enjoin state proceedings in order to protect and effectuate a prior federal judgment. This Court has characterized one of petitioners' cases, *Brown v. Felsen,* 442 U.S. 127, 138, as "finding congressional intent that state judgments would not have claim preclusive effect on dischargeability issue in bankruptcy."[13]

The *reductio ad absurdum* of petitioners' argument is that a federal court would be powerless, despite § 2283, to stay any state proceeding which nullified its prior judgment *unless* a federal injunction issued whenever there was a possibility that a state court might rule on the preclusive effect of an earlier federal judgment, and before the state court had an opportunity to do so. Such an absurd process would exacerbate, and certainly not relieve, friction between state and federal courts; and it would thwart the carefully defined congressional purpose of the 1948 revision of § 2283.

Southwest Airlines Co. v. Texas International Airlines, Inc., 546 F.2d 84 (5th Cir. 1977), *cert. denied* 434 U.S. 832; *Aerojet-General Corp. v. Askew,* 511 F.2d 710 (5th Cir. 1975), *cert. denied* 423 U.S. 908; *Donelon v. New Orleans Terminal Co.,* 474 F.2d 1108 (5th Cir. 1973), *cert. denied* 414 U.S. 855; *Woods Exploration & Pro. Co. v. Aluminum Co. of Amer.,* 438 F.2d 1286 (5th Cir. 1971), *cert. denied* 404 U.S. 1047; *Silcox v. United Trucking Service,* 687 F.2d 848 (6th Cir. 1982); *Harper Plastics v. Amoco Chemicals Corp.,* 657 F.2d 939 (7th Cir. 1981); *Wood v. Santa Barbara Chamber of Commerce,* 705 F.2d 1515 (9th Cir. 1983) *cert. denied,* 104 S. Ct. 1446; *Brown v. McCormick,* 608 F.2d 410 (10th Cir. 1979).

[13] *Marrese v. American Academy of Orthopaedic Surgeons,* ____ U.S. ____, 53 U.S.L.W. 4265, 4268 (1985). This case holds that a federal court should not give greater claim preclusion effect to an earlier state judgment on the merits than the state itself would have given.

3. Although the petition impermissibly seeks to raise for the first time a due process argument based on alleged unauthorized representation of the trustee in the federal action,[16] the argument itself has no merit. The court below, as the district court, held that as to facts relating to BHCA and fraud claims, "the Trustee is in privity with the Parsons as to the adjudication of those facts and is bound by the federal adjudication of those matters."[17] See *Montana v. United States,* 440 U.S. 147. The court below remanded to give the trustee an opportunity to convince the district court that his UCC claim was not based on the same alleged improprieties; and the trustee was unable to do so.[18] Indeed, a case cited by petitioners in an attempted demonstration of circuit conflict, *General Foods v. Mass. Dept. of Health,* 648 F.2d 784, 787 (1st Cir. 1981), holds that due process permits a non party to be bound by a judgment if "he had directly or vicariously a full and fair opportunity to present evidence and argument." All of them (pp. 21-22) hold questions of privity and adequate representation to be fact issues.

4. It is noteworthy that respondents did not bring the federal case but Bank was sued there by the Parsons petitioners and trustee deliberately chose to stay away. Dissatisfied with federal results, petitioners then attempted to relitigate in state court what was or could have been litigated in the federal action. The courts below correctly refused to countenance such tactics; enjoined further state proceedings; and thus furthered the congressional purpose of § 2283.

---

[16] Issues never adequately alleged and considered below are not before this Court. *Tennessee v. Dunlap,* 426 U.S. 312, 314, n. 2; *Capital Cities Cables v. Crisp,* 467 U.S. ____, 81 L.Ed.2d 580, 588; and *California v. Taylor,* 353 U.S. 553, 557, n. 2.

[17] 747 F.2d at 1380; A-24-25 of petition.

[18] District court order of March 29, 1985, Appendix A.

CONCLUSION

Accordingly, Petitioners have failed to advance any reason for the grant of certiorari and, for the foregoing reasons, it is respectfully submitted that their petition should be denied.

Respectfully submitted,

M. ROLAND NACHMAN, JR.
P. O. Box 668
Montgomery, AL 36101

Counsel of Record for
Respondents

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Brief of Respondents in Opposition upon counsel of record for Petitioners by depositing a copy in the United States Mail, postage prepaid, addressed as follows:

Mr. Frank Wilson
Beasley & Wilson
418 South Hull Street
Montgomery, AL 36104

Mr. James Jerry Wood
641 S. Lawrence Street
Montgomery, AL 36104

This 1st day of May, 1985.

M. Roland Nachman, Jr.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 83V-181-N

First Alabama Bank of Montgomery, N.A., et al.,
Plaintiffs,

vs.

Parsons Steel, Inc., et al.,
Defendants.

ORDER

(Filed March 29, 1985)

In accordance with the Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that the injunction heretofore issued by this Court in this cause should not be modified to allow the Trustee to pursue his UCC claim.

DONE this 29th day of March, 1985.

/s/ R. E. Varner
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 83V-181-N

First Alabama Bank of Montgomery, N.A., et al.,
Plaintiffs,

vs.

Parsons Steel, Inc., et al.,
Defendants.

OPINION

(Filed March 29, 1985)

The history of this case is well stated by the Court of Appeals in *Parsons Steel, Inc. v. First Alabama Bank of Montgomery,* 679 F.2d 242, [Parsons I], and in *First Alabama Bank v. Parsons Steel, Inc.,* 747 F.2d 1367 (11th Cir. 1984) [Parsons II]. The Court of Appeals in Parsons II remanded with instructions that this Court make fact-findings to determine whether the injunction should be modified to allow the Trustee to pursue his UCC claim based only on the actual foreclosure sale. That Court pointed out in guidance:

> "Assuming that the Trustee's UCC claim is based on factual allegations different from those underlying the fraud and BHCA claims, the parties' interests were not so closely aligned as to say the Parsons virtually represented the Trustee as to this narrow claim that the Parsons did not raise in the federal action."

In response to the remand for clarification of the commercial unreasonableness claim, this Court ordered the Trustee to specifically set out said claim. That claim will be considered and compared to the Parsons I claim hereinafter.

The Court of Appeals stated in Parsons II that, almost a year after this Court's judgment [referring to Parsons I] in the

Bank's favor, "the Trustee amended his [State] complaint to include the UCC claim that the foreclosure sale was commercially unreasonable. Until that point in the litigation, the state action against the Bank was based on factual allegations which had been fully adjudicated in the BHCA action. With the addition of the UCC claim, however, the state action began to involve fact questions which the district court found were part of the federal complaint, but which were not reached in the federal litigation" [Parsons II, at 1379-1380]. The Court of Appeals held that the record on appeal was insufficient, however, to determine whether the UCC claim is based on the same factual allegations as was the fraud and the BHCA claims. As noted by the Court of Appeals [Parsons II, at p. 1379], the UCC claim in Parson II is based on commercial unreasonableness. Paragraph 27 of the complaint in Parsons I federal case concerned commercial unreasonableness.[1] This Court found against the Plaintiff on all aspects. Responsibility is on appellant to have a record showing the error. Nonetheless, the Appellate Court, in its remand, states the following:

---

[1] Said Paragraph 27 of the Parsons I complaint contained this allegation: "The sale *** was not handled in a commercially reasonable manner ***." The pleaded reasons therefor related to the same facts from which the BHCA violation and the fraud allegations allegedly arose as stated in the complaint. Loose pleading requirements allowed Plaintiffs to state in a one-count or one-claim complaint allegations of a BHCA violation [Paragraph 34], a conspiracy [Paragraphs 25 and 29], a trust violation [Paragraph 26], a commercially unreasonable sale [Paragraph 27], lack of good faith, CODE OF ALABAMA [1975], § 7-1-201, and fraud [Paragraph 30]. It is difficult for this Court to understand the conclusion in the dissent, Parsons II, at p. 1382, as follows: "[A]s the majority correctly notes, the commercial reasonableness claims - the factual basis for which is unclear on the present record - were not pleaded at all in the federal action." The Trustee's attorney had access to these pleadings and participated in discovery. He was clearly privy to the commercial reasonableness claims. If they were treated as damages, he had every opportunity to have prayed that they be treated as a separate cause of action.

> "If the UCC claim merely alleges that improprieties involving the Bank and Michael Orange prior to the sale resulted in the receipt of an unfairly low price for the company's assets, then the district court was correct in finding privity and barring the Trustee from asserting the UCC claim in state court." Parsons II, supra, at 1380.

CURRENT UCC CLAIM. Whether or not the UCC claim alleges only that "improprieties involving the Bank and Michael Orange prior to the sale resulted in the receipt of an unfairly low price for the company's assets" can best be determined by examining the Trustee's Claims filed herein February 21, 1985, in response to this Court's Order entered February 6, 1985, directing that the Trustee state with particularity his UCC claims.

CURRENT CLAIMS OF TRUSTEE. Guided by the Order of the Court of Appeals that res judicata would bar no part of the Trustee's UCC claims "separate and apart from any of the events leading up to the sale" [Parsons II, supra, at p. 1380], the Trustee's attorney sought to direct his claims to some impropriety occurring after the sale, complaining of a "commercially unreasonable sale and wrongful disposition of the assets of Parsons Steel Industries, Inc. *** after a foreclosure in January of 1979," in violation of CODE OF ALABAMA [1975], §§ 7-9-504, 7-9-507 and 7-1-201. Sections 7-9-504 and 7-9-507 deal with a commercially unreasonable sale, and Section 7-1-201 deals with the duty of good faith.[2]

More specifically, the Trustee contends in his response to this Court's Order directing specificity the following: (1) that the sale was a private sale of the securities two days after repossession; (2) that only one potential buyer was notified of the sale; (3) that the buyer had no pre-sale experience in the steel business; (4) that no contact was made with any person in the

---

[2] It is noted that Paragraphs 27 and 30 of the complaint in Parsons I contained allegations of a commercially-unreasonable sale and a lack of good faith, respectively.

steel business or with any unsecured creditor; (5) that no notice was given the attorney for Parsons Steel Industries, Inc.; (6) that no notice was placed in any steel interests or public publications; (7) that no one except seller and purchaser were in attendance at the sale; (8) that the sale was at a private place; (9) that only one bid was offered and accepted; (10) that the price paid at the sale was determined in accordance with the amount necessary to satisfy the Bank's secured debt; and, finally, (11) that the sales price was $907,252.85 while the value of the collateral was in excess of $2,500,000.00.

It appears to this Court and this Court finds that each of these items of the current contentions of the Trustee was part of the original claims made in this Court and litigated in the suit by Parsons Steel, Inc., and affirmed by the Court of Appeals in Parsons I, supra.

In Paragraph 14 of the complaint [Parsons I], Plaintiffs alleged that on November 30, 1978, a balance sheet of Parsons Steel Industries, Inc., showed assets of $2,384,945.89 and liabilities of $1,910,747.09. Plaintiffs alleged in Paragraph 16 of the complaint that conditions were substantially the same on January 17, 1979. Paragraph 24 of the complaint contained allegations that on January 17, 1979, a private sale of the assets of Parsons Steel Industries, Inc., was held at 10:00 a.m., rather than at the announced time of 2:00 p.m., to OSI, Inc., for $907,252.85. Paragraph 25 of the complaint contained allegations that the agent of the Bank and Mr. Orange for OSI, Inc., worked in concert so as to obtain properties of Parsons Steel Industries, Inc., for Orange. Paragraph 26 of the complaint contained allegations suggesting a violation of a resulting trust. Paragraph 27 of the complaint contained allegations that the sale was "not handled in a commercially-reasonable manner in that the acquisition and sale were completely transacted in less than two days with the price paid by OSI being substantially less than the market value of the assets purported to be sold;" that no additional possible purchasers were given any opportunity to in-

spect the properties and submit bids; that the sale was not handled in conformity with reasonable commercial practices; and that the assets sold for other than the fair market value thereof. Paragraph 29 of the complaint contained allegations that the Bank, Orange and others were guilty of "collusion *** to do great damage and economic harm to the Plaintiffs and which effectively put ***" Parsons Steel Industries, Inc., out of business. Paragraph 30 of the complaint contained allegations of lack of good faith and fraud with intent to deceive and injure the Plaintiffs and the creditors of Parsons Steel Industries, Inc. Paragraph 32 of the complaint contained allegations of the January 17, 1979, private sale to OSI, Inc., a newly formed corporation, resulting in Plaintiffs' loss of an on-going business together with its assets, leaving unsecured debtors owed $847,000.00. Paragraph 34 of the complaint contained allegations of a violation of the Bank Holding Company Act. Paragraph 37 of the complaint contained allegations that Parsons Steel Industries, Inc., had been placed in involuntary bankruptcy. The trustee in Bankruptcy and his attorney participated in discovery proceedings in Parsons I and, obviously, had access to the complaint which contained the above allegations when he elected not to pursue any remedy on the Trustee's part or on behalf of the creditors.

Another indication that the State claims relate to alleged pre-sale activity can best be determined by the way that the Trustee's attorney processed them in the State court proceeding. In his opening statement, Mr. Wood adopted Mr. Beasley's statement, saying specifically the unsecured creditors "*** had no notice of any foreclosure sale" and that "the Bank obtained from Michael Orange enough to satisfy the Bank's debt but not any more ***." [R. 61-62]. In his closing argument, Mr. Wood stated, "We are entitled to recover on commercial reasonableness—on fraud and conspiracy." [R. 1573]. Mr. Wood, further referring to the pre-sale failure to obtain purchasers and to determine the value of inventory, said that the

Bank "didn't try to find out. Just figured out what the Bank was owed. Same answers on all the other assets of Parsons Steel." [R. 1573]. Mr. Wood stated that "*** Parsons Steel Montgomery is entitled to recover *** on the commercial reasonableness *** of the sale ***. It was *all pre-arranged.* *** It was done in hidden fashion. *** You've got a corporation that was formed especially for it" (emphasis added). [R. 1575]. Mr. Wood spoke of the Bank's wanting to avoid a Chapter 11 proceeding because it would have been more difficult. He spoke of the fact that the time of the sale was changed from "ten to two" because they did not want anyone else there because they "*** were going to sell to Michael Orange," that "they made that decision way back on the tenth or eleventh". [R. 1576]. Referring to the same pre-sale activity, Mr. Wood stated: "Some how, some way in December, they decided to do it differently." [R. 1578].

Trustee's attorney at the State trial complained (1) of plans made before the sale, (2) of fraudulent plans before the sale, (3) of insufficient notice before the sale, (4) of changing before the sale of the time of the sale, (5) of plans to sell to Orange made before the sale, (6) of plans to sell for the amount owed the Bank before the sale, (7) of avoidance of a Chapter 11 proceeding before the sale, (8) of failure before the sale to determine what the inventory was worth, (9) of failure before the sale to determine what other assets were worth and, finally, (10) of the "pre-arranged" lack of "commercial reasonableness of the sale".

Every word of the Trustee's attorney's statements during the State Court trial was devoted to pre-sale activities of Michael Orange and the Bank's agent Herbert. No suggestion was made that the Defendants in the State court case did anything wrong after the sale. The only substantial change in the Trustee's position is that the Trustee's attorney, guided now by the admonition of the Court of Appeals, alleged, as a preamble to allegations of pre-sale activities, that the Bank "conducted a commer-

cially unreasonable sale and wrongful disposition of the assets of Parsons Steel Industries, Inc., ***" after a foreclosure in January, 1979.

The Court of Appeals stated that, because the questions of liability and damages were bifurcated, evidence of an insufficient price as bearing on commercial reasonableness was never presented to the jury in the federal court trial. The parties to that proceeding and the Trustee had access to the pleadings and participated in a number of the discovery proceedings. They understood that commercial reasonableness of the sale was an issue in the case, whether as damages for the Bank Holding Company Act violation or as an independent claim as now asserted, and the Trustee had every opportunity to litigate commercial reasonableness either as a part of the Bank Holding Company Act or as a part of an independent claim for commercial reasonableness at his option. If the alleged value of the assets as compared to the sales price were not litigated in the trial proceeding in this Court, it was because the parties did not present it to this Court as an issue independent of the Bank Holding Company Act violation. The Trustee knowingly declined to participate. His failure to do so, whether by design (so as to obtain two bites at the apple) or by inadvertence, bars his doing so now under the doctrine of res judicata.

The Trustee's contention that the sales price was unreasonable derives from Plaintiff's claim in Parsons I that the whole thing was planned prior to the sale and that the Bank's agent and Michael Orange, the purchaser, knew and arranged prior to the sale that the sales price would be the amount of the debt to the Bank. Note 11 of the Opinion of the Court of Appeals in Parsons II, supra, at 1373-1374, reads as follows:

> "The record in this appeal does not indicate what precise facts the UCC claim is based on. That is, it is unclear whether the claim is based on allegations that something about the handling of the actual sale was commercially

> unreasonable and resulted in an insufficient price or whether the UCC claim is based solely on allegations that improprieties involving the Bank and Orange prior to the sale resulted in an unfairly low price."

This Court concludes that the Court of Appeals' Opinion means that, if nothing wrongful happened at the time of the actual sale and the improprieties complained of involved allegations of wrongs by the Bank and Orange prior to the sale resulting in an unfairly low price, then Parsons and all those associated with him, including the Trustee, are barred from further pursuit of this proceeding. Clearly, in the mind of the Court the things that the Trustee still argues were wrongful occurred prior to the sale. While the Trustee insists that the sale itself was unreasonable and the disposition of the proceeds was wrong, he alleges no non-conclusory facts which would indicate that any wrong that was done at or after the sale was improper. His claims of impropriety relate to plans made by Herbert and Orange: failure to give public notice of the sale, failure to seek buyers for the sale, failure to hold the sale at the time previously planned and failure to learn the value of the property securing the debt - in short, failure to do those things prior to the sale which allegedly would have produced a fair price for the property sold. All of those matters have been litigated, and the Court of Appeals has affirmed a judgment for the defendant thereon. The Trustee, being in privy with the plaintiffs in that case, is bound by the proceeding.

This Court has been troubled by factors raised in the dissent in Parsons II beginning at 747 F.2d 1367. The dissenter takes the position that, while the original federal adjudication of this proceeding might have initially provided a res judicata bar to the Sate court proceeding, the determination by the State court that the federal court proceeding was not res judicata of the issues in the State court constituted a res judicata bar to the federal court's considering the matter. The Bank, realizing that the pleadings were not specific and initially having its own

doubts that all of the issues in the State court proceeding were barred by the doctrine of res judicata, found it necessary to proceed in the State court proceeding in order to determine that the issues in the State court proceeding were the same as that already concluded by this Court's judgment. That being true, the doctrine of res judicata could only be applied at such time as the issues in the State court proceeding were clearly identified and could be compared to the issues in Parsons I.

The dissenter argues that the Bank should have sought an injunction before the trial in the State court. In cases such as this where issues are not clear in either court, a special hearing would be required to determine precisely what the issues were in each proceeding. On occasion (and probably in this case) this could not have been fully determined until the trial on the issues. If this Court is to protect its jurisdiction, it must have the authority to do so at the point where invasion of jurisdiction becomes apparent. Piecemeal decisions thereon would be of little value.

This Court is of the opinion that the res judicata issue cannot be determined in some cases until the trial on the merits and that the Defendants in this case, by submitting to a trial on the merits including the plea of res judicata in the State case, cannot be held to a waiver of their rights to submit the res judicata issue to the court first having jurisdiction because the issue of waiver concerns itself with private rights as distinguished from public rights and the doctrine of res judicata has as its purpose the avoidance to the public, as well as the parties, of expenses of unnecessary litigation and the conservancy of judicial efforts. This Court is convinced that no private individual should be allowed in effect to waive the effect thereof.

This Court, therefore, finds that the injunction heretofore issued by this Court should not be modified to allow the Trustee to pursue his UCC claim because that claim is based on matters heretofore litigated by this Court and the Trustee was privy to such litigation.

An Order will be enacted in accordance with this Opinion.

DONE this 29th day of March, 1985.

/s/ R. E. Varner
United States District Judge

Supreme Court, U.S.
FILED
AUG 7 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1616

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PARSONS STEEL, INC., JIM D. PARSONS and MELBA L. PARSONS, and A. POPE GORDON, Trustee in Bankruptcy for the Estate of PARSONS STEEL INDUSTRIES, INC.,

Petitioners,

vs.

FIRST ALABAMA BANK OF MONTGOMERY, N. A., and EDWARD HERBERT,

Respondents.

JOINT APPENDIX

Volume I

FRANK M. WILSON
BEASLEY and WILSON
418 South Hull Street
Montgomery, AL 36104
(205) 269-2343

Counsel of Record for Petitioners Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons

M. R. NACHMAN
STEINER, CRUM & BAKER
P. O. Box 668
Montgomery, AL 36101
(205) 832-8800

Counsel of Record for Respondents

(Additional Counsel listed inside front cover)

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

Petition for Writ of Certiorari filed April 15, 1985
Certiorari Granted June 24, 1985

BEST AVAILABLE COPY

JAMES JERRY WOOD
WOOD and PARNELL
641 South Lawrence Street
Montgomery, AL 36101
(205) 832-4202

Counsel of Record for
Petitioner A. Pope Gordon,
Trustee in Bankruptcy for
the Estate of Parsons
Steel Industries, Inc.

BEST AVAILABLE COPY

INDEX

Page

Volume I:

Chronological List of Relevant Docket Entries 1

Complaint, Filed March 7, 1983 3

Answer of A. Pope Gordon, filed March 17, 1983 106

Answer of Parsons Steel, Inc., et al., filed March 17, 1983 109

Transcript of Proceedings, March 17, 1983 111

Courtroom Deputy's Minutes of Hearing, March 17, 1983 164

Plaintiffs' Exhibit 1 167

Plaintiffs' Exhibit 2 181

Plaintiffs' Exhibit 3 185

Plaintiffs' Exhibit 4 186

Plaintiffs' Exhibit 5 187

Plaintiffs' Exhibit 6 190

Plaintiffs' Exhibit 8 194

Plaintiffs' Exhibit 9 203

Defendants' Exhibit 1 214

Defendants' Exhibit 2 216

Defendants' Exhibit 3 218

Defendants' Exhibit 4 219

Defendants' Exhibit 8 220

Defendants' Exhibit 9 221

Defendants' Exhibit 10 224

Defendants' Exhibit 11 227

Defendants' Exhibit 12 229

Defendants' Exhibit 13 235

Defendants' Exhibit 14 237

Defendants' Exhibit 15 238

Defendants' Exhibit 17 239

Defendants' Exhibit 18 240

Defendants' Exhibit 19 241

Defendants' Exhibit 20 250

Defendants' Exhibit 22 251

Volume II:

Request of Defendant Gordon to take Judicial Notice, Filed March 31, 1983 253

Request of Defendants Parsons and Parsons Steel to Take Judicial Notice, filed March 24, 1983 255

Amendment to Answer by Parsons and Parsons Steel, Filed April 1, 1983 257

Amendment to Answer of Defendant Gordon, filed April 5, 1983 258

Defendants' Supplementation to Request to Take Judicial Notice, Filed May 2, 1983 259

Opinion of District Court, Filed June 15, 1983 ..... *Petition for Certiorari p. A-31*

Motion to Supplement Record on Appeal, Filed July 14, 1983 305

Order of Court of Appeals Granting Motion To Supplement Record, Filed August 1, 1983 307

Opinion of Court of Appeals, Filed December 4, 1984 .... *Petition for Certiorari p. A-1*

Trustee's Statement of Claim, Filed February 26, 1985 . 307

Plaintiffs' Response to Trustee's Statement of Claim, Filed _____ 327

District Court Opinion and Order, Filed March 29, 1985 344

District Court Order Filed May 21, 1985 354

Trustee's Notice of Appeal, Filed May 28, 1985 357

Portions of the Proceedings in Parsons Steel, et al. v. First Alabama Bank of Montgomery, Case Number 79-249-N:

District Court Order Denying Motion for Summary Judgment 358

Excerpts from Deposition of Jimmy Douglas Parsons, February, 18, 1980 368

Excerpts from Deposition of Jimmy Douglas Parsons, March 7, 1980 370

Excerpts from Deposition of Jimmy Douglas Parsons, October 9, 1979 372

Excerpts from Deposition of Melba Parsons, February 18, 1980 374

Excerpts from Deposition of Michael Orange, January 22, 1980 376

Excerpts from Deposition of E. W. Hodge, October 9, 1979 378

Excerpts from Deposition of Luther Waller, January 28, 1980 380

Excerpts from Deposition of Samuel Kauffman, January 21, 1980 382

Excerpts from Deposition of William E. Epperson, January 21, 1980 384

Excerpts from Deposition of William M. Jordan, Jr., January 21, 1980 386

Excerpts from Deposition of James S. Gaskell, Jr., January 21, 1980 388

Excerpts from Deposition of Charles M. Hines, January 21, 1980 390

Excerpts from Deposition of Thomas R. Peacock, January 21, 1980 392

Excerpts from Deposition of J. Allen Reynolds, January 21, 1980 394

Excerpts from Deposition of Paul E. Norris, January 21, 1980 396

Excerpts from the Court's Opening Charge to the Jury 398

Excerpts from Opening Argument of Plaintiffs ... 401

Excerpts from Opening Argument of Defendants . 407

Excerpts from the Testimony of Edmond W. Hodge 410

Excerpts from the Testimony of Jimmy Douglas Parsons 413

Excerpts from the Testimony of June Neely Williams 435

Excerpts from the Testimony of William Richardson 439

Excerpts from the Testimony of Edward Herbert .. 455

Excerpts from the Testimony of Michael Orange .. 441

Excerpts from Plaintiffs' Closing Argument 456

Excerpts from Defendants' Closing Argument 466

Excerpts from Plaintiffs' Final Closing Argument . 469

Excerpts from the Court's Oral Charge 469

RELEVANT DOCKET ENTRIES

March 7, 1983	Complaint For Preliminary and Permanent Injunction
March 17, 1983	Answer to the Complaint of A. Pope Gordon
March 17, 1983	Answer to the Complaint of Parsons Steel, Inc., Jim D. Parsons & Melba L. Parsons
March 17, 1983	Hearing on Request for Preliminary Injunction
April 1, 1983	Amendment to Answer to Complaint by Parsons Steel, Inc., Jim D. Parsons, and Melba L. Parsons
April 5, 1983	Amendment to Answer to Complaint of Defendant Gordon, Trustee
May 2, 1983	Defendants' Supplementation to Request that the Court take Judicial Notice of Evidence
June 15, 1983	Opinion
June 15, 1983	Judgment and Order
June 27, 1983	Notice of Appeal of Defendant A. Pope Gordon to the U.S. Court of Appeals for the Eleventh Circuit
June 29, 1983	Notice of Appeal of Defendant Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons to the U.S. Court of Appeals for the Eleventh Circuit
January 28, 1985	ORDER (Issued as Mandate 1/24/85) of U.S. Court of Appeals, Eleventh Circuit
February 21, 1985	Trustee's Claims

February 26, 1985	Plaintiffs' Response to Trustee's Claim
March 29, 1985	Opinion
March 29, 1985	Order
April 2, 1985	Trustee's Motion for Reconsideration
May 21, 1985	Order
May 28, 1985	Defendant Tom McGregor, as Trustee for Parsons Steel Industries, Inc., a Bankrupt, Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. _____

First Alabama Bank of Montgomery, N.A., and
Edward Herbert,

Plaintiffs,
v.

Parsons Steel, Inc., Jim D. Parsons, Melba L. Parsons,
and Parsons Steel Industries, Inc., and A. Pope Gordon,
as Trustee in Bankruptcy for Parsons Steel Industries, Inc.

Defendants.

This is an original action related to and arising out of
Parsons Steel, Inc., et al v.
First Alabama Bank of Montgomery, N.A.,
Civil Action No. CV-79-249-N.

COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTION

Parties

1. Plaintiff First Alabama Bank of Montgomery, N.A. ("Bank") is a national banking association with its principal and only place of business located in Montgomery, Alabama. Plaintiff Edward Herbert ("Herbert") is a resident of Montgomery, Alabama.

2. Defendant Parsons Steel, Inc. ("Parsons-Mobile") is a corporation incorporated under the laws of the State of Alabama having its principal place of business in Mobile County, Alabama. Parsons-Montgomery is a wholly owned subsidiary of Parsons-Mobile. Defendant Jim D. Parsons and defendant Melba L. Parsons are individuals who reside in Mobile County, Alabama, and own 1 share and 98 shares respectively of the common capital stock of Parsons-Mobile of the 100 shares issued and outstanding. Defendant Parsons Steel

Industries, Inc., ("Parsons-Montgomery") is a corporation incorporated under the laws of the State of Alabama which had a principal place of business located in Montgomery County Alabama. Parsons-Montgomery does not do business because it was adjudged a bankrupt in *In re Parsons Steel Industries, Inc.*, Bankruptcy No. 79-173-N, United States District Court for the Middle District of Alabama. Defendant A. Pope Gordon has been appointed by the Bankruptcy Court in Bankruptcy Case No. 79-173-N as the Trustee for Parsons-Montgomery.

3. All of the above-described defendants are plaintiffs in *Parsons Steel Industries, Inc., et al v. First Alabama Bank of Montgomery, N.A., et al,* Civil Action No. CV-79-179-G, in the Circuit Court for Montgomery County, Alabama ("State Action"). Currently pending before the Circuit Court in that action are the motions for judgment n.o.v. and motions for new trial of Eank and Herbert.

4. Parsons-Mobile, Jim D. Parsons and Melba L. Parsons were plaintiffs in *Parsons Steel Inc., et al v. First Alabama Bank of Montgomery, N.A.*, Civil Action No. CV-79-249-N, in the United States District Court for the Middle District of Alabama, Northern Division ("Federal Action").

Jurisdiction

5. This Court has jurisdiction because this action arises under 28 U.S.C. § 2283, which provides that this Court may grant an injunction to stay proceedings in a state court "where necessary in aid of its jurisdiction or to protect or effectuate its judgments," as hereinafter more fully appears. Federal courts have traditionally exercised jurisdiction under this statute to prevent relitigation in a state court of matters which have been or could have been litigated in a federal action which culminated in a prior judgment. *Bank of Heflin v. Miles,* 621 F.2d 108 (5th Cir. 1981). The amount in controversy exceeds $10,000 exclusive of interest and costs.

Factual Allegations

6. On February 15, 1979, Parsons-Montgomery, Parsons-Mobile, Jim D. Parsons and Melba L. Parsons filed their com-

plaint in the State Action against Bank and Herbert. This complaint generally avers fraud in connection with an alleged requirement by Bank that Parsons-Montgomery change its management and ownership as a condition for further financing and alleged violations of Alabama law in connection with the subsequent repossession and sale of the property of Parsons-Montgomery.

7. On May 30, 1979, Parsons-Mobile, Jim D. Parsons and Melba L. Parsons filed their complaint in the Federal Action against Bank. This complaint avers that the above-described requirement of a change in management and ownership of Parsons-Montgomery as a condition for further financing violated 12 U.S.C. § 1972(1)(c), a provision of the federal Bank Holding Company Act.

8. The complaints in both the State Action and the Federal Action are virtually identical. Attached hereto as Exhibit "A" and incorporated by reference is a side-by-side comparison of substantive paragraphs contained in the state and federal complaints. This comparison graphically demonstrates that the complaint in the deral Action was in large measure copied word for word from the complaint in the State Action. Copies of these complaints in the State and Federal Actions are attached hereto as Exhibits "B" and "C" respectively and are hereby incorporated by reference.

9. In the Federal Action, this Court separated the issue of liability from other issues. After a jury verdict for plaintiffs, the Court granted Bank's motion for judgment n.o.v.; set aside the jury verdict; and rendered the order, judgment and opinion of June 17, 1981 ("Federal Judgment", a true and correct copy of which is attached hereto and made a part hereof as Exhibit "D"). The Federal Judgment dismissed the Federal Action on the merits. This Court noted the following:

> "It is significant that (1) there was a loan to Parsons Steel, but it was made by an officer of the bank for whose conduct plaintiffs make no complaint; (2) there was a change in management of Parsons Steel, but no loan was made in connection therewith or conditioned thereon; (3) there was a change of ownership of Parsons Steel, but it resulted

from foreclosure of a mortgage which, unfortunately, is a routine banking practice and which, apparently, Mr. Parsons agreed to (see his waiver of notice, etc.); and (4) there is no evidence that the facts asserted in this cause, under the circumstances of this case, constitute an unusual banking practice."

These findings and others by this Court in the opinion which accompanied Federal Judgment show that the material allegations of the complaints in both the Federal and State Actions are false.

The Eleventh Circuit affirmed Federal Judgment on June 25, 1982. 679 F.2d 242 (11th Cir. 1981), a copy of which is attached as Exhibit "E". The defendants who were plaintiffs in the Federal Action sought no further review.

10. Following the conclusion of the Federal Action, Bank and Herbert — in numerous state pretrial proceedings — repeatedly, and unsuccessfully, raised the ground that the Federal Action, which had been concluded on its merits, barred further prosecution of the State Action on principles of *res judicata* and collateral estoppel. The state court, on the contrary, required State Action to proceed through jury verdicts on February 9, 1983 and state judgments on them. Bank and Herbert have again asserted the bar of the judgment in Federal Action as ground for a state judgment n.o.v., currently pending in the state court. (A copy of the relevant portions of these motions for judgment n.o.v. are attached as Exhibit "F".)

Request for Injunctive Relief

11. The State Action is an attempt by defendants to relitigate matters which have been or could have been tried to conclusion in Federal Action. Such relitigation is barred by res judicata and collateral estoppel. This Court has jurisdiction under 28 U.S.C. § 2283 to enjoin further proceedings in the State Action because an injunction is necessary to protect or effectuate this Court's prior judgment in the Federal Action. All of the claims asserted in the State Action arise from a common nucleus of operative fact and should have been asserted in the Federal Action under this Court's power to hear pendent claims. The purpose of Con-

gress in the 1948 legislation which enacted 28 U.S.C. § 2283 in its present form was to permit federal courts to enjoin relitigation in state courts of matters finally adjudicated in federal courts. A federal court may enjoin state proceedings when principles of *res judicata* or collateral estoppel would bar such similar actions in a federal court. Defendants had a full opportunity to join their State Action claims with the claim for relief under the Bank Holding Company Act, 12 U.S.C. § 1972(1)(c); they failed to do so and sought to split their causes of action in state and federal courts, even though the doctrine of pendent jurisdiction and the broad joinder provision of the Federal Rules of Civil Procedure provided them with the vehicle for presenting to this Court in the Federal Action all of their several theories of relief. The injunctions sought in this action are essential to the preservation of the integrity of this Court's jurisdiction and the effectuation of its prior judgment — a judgment which has been upheld by the Eleventh Circuit Court of Appeals; and are essential as well to prevent irreparable injury to Bank and Herbert who have no other adequate remedy.

WHEREFORE, premises considered, Bank and Herbert pray for:

(a) A preliminary and permanent mandatory injunction requiring Parsons-Montgomery, A. Pope Gordon as Trustee for Parsons-Montgomery, Parsons-Mobile, Jim D. Parsons and Melba L. Parsons, their agents, servants, employees, attorneys, and all persons in active concert or participation with them, to take whatever steps are necessary to dismiss the State Action.

(b) A preliminary and permanent injunction enjoining Parsons-Montgomery, A. Pope Gordon as Trustee for Parsons-Montgomery, Parsons-Mobile, Jim D. Parsons and Melba L. Parsons, their agents, servants, employees, attorneys, and all persons in active concert or participation with them, from attempting to enforce or execute upon any judgments entered on the jury verdicts returned in the State Action.

(c) A preliminary and permanent injunction staying further proceedings in the State Action.

(d) A preliminary and permanent injunction nullifying all Alabama state court orders in conflict with the order and judgment of this Court in the Federal Action.

(e) A preliminary and permanent injunction against the institution and prosecution of any other or different action in state or federal courts which seeks to relitigate there any matters which were or could have been litigated in Federal Action.

(f) Their costs and attorneys' fees incurred in the State Action and this cause.

(g) Such other, further or different relief as this Court may deem appropriate in the premises.

STEINER, CRUM & BAKER

BY M. R. Nachman, Jr.

BY James A. Byram, Jr.

Attorneys for Plaintiffs
First Alabama Bank of Montgomery,
and Edward Herbert

P.O. Box 668
Montgomery, AL 36101

EXHIBIT A

COMPARISON OF CORRESPONDING PARAGRAPHS OF STATE AND FEDERAL COMPLAINT

State Complaint	Federal Complaint
12. For a substantial period of time prior to November 30, 1978, "First Alabama" loaned "Industries" a considerable amount of money for operating and other purposes in its business. "Industries" in turn executed security agreements to "First Alabama" on certain personal property and assets over the life in connection with said loans. At no time prior to November 30, 1978, did "Industries" refuse to pay or fail to pay any of its indebtedness to "First Alabama." During the life of said loans "First Alabama," acting by and through its agents, servants, or employees, including "Herbert," advised and consulted with "Industries" in its business operation and management. "Herbert" personally took over the handling of said loans on a date prior to November 30 in the year 1978 due to the fact that the employee of the bank handling the loans left the employ-	12. For a substantial period of time prior to November 30, 1978, Defendant loaned Subsidiary a considerable amount of money for operating and other purposes in its business. Subsidiary, in turn, executed security agreements to Defendant on certain personal property and assets over the life in connection with said loans. At no time prior to November 30, 1978, did Subsidiary refuse to pay, or fail to pay, any of its indebtedness to Defendant. During the life of said loans, Defendant, acting by and through its agents, servants, or employees, advised and consulted with Subsidiary in its business operation and management. A Senior Vice President, Edward Herbert, personally took over the handling of said loans on a date prior to November 30, 1978, due to the fact that the employee of the bank handling the loans left the employment of Defendant. Subsequent to said date, Mr.

State Complaint	Federal Complaint
ment of "First Alabama." Subsequent to said date, "Herbert" advised and counselled with "Parsons" concerning the operation and management of "Industries."	Herbert advised and counselled with Subsidiary concerning the operation and management of Subsidiary.
14. On a later date and prior to November 30, 1978, "Herbert" again approached "Parsons" with a request that he enter into negotiations with another prospective purchaser, namely, "Orange." Shortly thereafter "Orange" came to "Industries' " location and looked over the operation. "Orange" later indicated to "Parsons" that he was not interested in purchasing the business, but planned to take over the management of "Industries" at the request and under the direction of "First Alabama" and "Herbert."	13. On a date prior to November 30, 1978, Defendant acting by and through its officer, agent, and employee, Herbert, approached Subsidiary with a request that negotiations be undertaken by Subsidiary with a prospective purchaser, namely Michael Orange. Shortly thereafter, Mr. Orange came to Subsidiary's business location and looked over the operation. Mr. Orange later indicated to Subsidiary that he was not interested in purchasing the business, but planned to take over the management of the company at the request and under the direction of Defendant.
13. Subsequent to the events alleged in paragraph 14, a local attorney, namely Samuel Kaufman, at the direction of "Herbert" and "Orange" was	14. Subsequent to the events alleged in paragraph 13 above, a local attorney, namely Samuel Kaufman, at the direction of Defendant and Mr.

State Complaint

employed to represent "Industries" to bring about a proposed composition of creditors. "Herbert" instructed "Parsons" to secure a certified audit of the assets and liabilities of "Industries" for distribution to all creditors of "Industries." "Parsons" then employed Vilas V. Vawtar and Associates, P.C., Certified Public Accountants, to comply with "Herbert's" instructions. The work was completed by the accounting firm during the period November 27-28, 1978, and the information made available to the bookkeeper regularly employed by "Industries." A balance sheet on "Industries" was subsequently prepared as of November 30, 1978, by said bookkeeper, using the information supplied by the accounting firm and transmitted to "Orange." This balance sheet showed, as of November 30, 1978, total assets of $2,384,945.89 with total liabilities of $1,910,747.09. "Orange" and "Herbert" refused to use this information and instead supplied information to Kaufman reducing the total assets of "Industries" from $2,384,945.89 to $1,034,000.00

Federal Complaint

Orange, was employed to represent Subsidiary to bring about a proposed composition of creditors. Defendant instructed Subsidiary to secure a certified audit of the assets and liabilities of the company for distribution to all of its creditors. Subsidiary had employed Vilas V. Vawtar and Associates, P.C., Certified Public Accountants, to comply with Defendant's instructions. The work was completed by the accounting firm during the period November 27-28, 1978, and the information made available to the bookkeeper regularly employed by Subsidiary. A balance sheet on Subsidiary was subsequently prepared as of November 30, 1978, by said bookkeeper, using the information supplied by the accounting firm and transmitted to Mr. Orange. This balance sheet showed, as of November 30, 1978, total assets of $2,384,945.89 with total liabilities of $1,910,747.09. Mr. Orange and Mr. Herbert refused to use this information and instead supplied information to Attorney Kaufman reducing the total assets of Subsidiary from $2,384,945.89 to $1,034,000.00

State Complaint	Federal Complaint
16. On or about December 14, 1978, "Orange" became Chief Executive Officer of "Industries" on the direct insistance of "First Alabama" and "Herbert." At said time, at the request of "Herbert," "Parsons" resigned as President of "Industries."	15. On or about December 14, 1978, Mr. Orange became Chief Executive Officer of Subsidiary on the direct insistance of Defendant, as a condition of Defendant's renewing Subsidiary's loans and extending operating loans, letters of credit, etc., in the future. At the request of Defendant, Jim D. Parsons resigned as President of Subsidiary as a further condition of credit by Defendant.
17. There was no significant change in the assets or inventory maintained by "Industries," nor in the liabilities of said company from November 27, 1978 to January 17, 1979.	16. There was not significant change in the assets or inventory maintained by Subsidiary nor in the liabilities of said company from November 27, 1978 to January 17, 1979.
18. Attorney Kaufman, at the request of "Orange" and "Herbert," sent a letter to all creditors of "Industries" dated December 21, 1978, which in effect proposed a common law composition of creditors. This proposal was conceived by "Orange" with the overt concurrence of "Herbert." The proposal, mailed to all creditors, listed	17. Attorney Kaufman, at the request of Mr. Orange and Defendant sent a letter to all creditors of Subsidiary dated December 21, 1978, which in effect proposed a common law composition of creditors. This proposal was conceived by Mr. Orange and Defendant. The proposal, mailed to all creditors, listed the assets of Subsidiary as "approximately

State Complaint

the assets of "Industries" at "approximately $1,034,000.00" with liabilities of "approximately $1,948,000.00" and with a negative net worth of "approximately $914,000.00." The proposal stated that it was prepared by the management of "Industries," and stated further that "First Alabama" held a secured position as against all creditors to the extent of $1,200,000.00. The proposal stated further that "First Alabama" had refused to continue to carry "Industries' " loans unless "Industries" brought in new management, and further that "First Alabama" located "Orange" to fill this newly created management role. The proposal stated further that "First Alabama" conditioned restructuring of the existing debt of "Industries" upon acceptance of "Orange" to assume the position of President and Chief Executive Officer of "Industries" and that "Orange" had already assumed the management of "Industries." The proposal stated further that "Parsons" had resigned as President and

Federal Complaint

$1,034,000.00" with liabilities of "approximately $1,948,000.00" and with a negative net worth of "approximately $914,000.00." The proposal stated that it was prepared by the management of Subsidiary, and stated further that Defendant held a secured position as against all creditors to the extent of $1,200,000.00. The proposal stated further that Defendant had refused to continue to carry Subsidiary's loans unless Subsidiary brought in new management, and further that Defendant located Mr. Orange to fill this newly created management role. The proposal stated further that Defendant conditioned restructuring of the existing debt of Subsidiary upon acceptance of Mr. Orange by Subsidiary to assume the position of President and Chief Executive Officer of Subsidiary, and that Mr. Orange had already assumed the management of Subsidiary. The proposal stated further that Jim D. Parsons had resigned as President and Chief Executive Officer of Subsidiary and that Mr.

State Complaint	Federal Complaint
Chief Executive Officer of "Industries" and that "Orange" had replaced him, and further, that "Parsons' " salary had been reduced by 50 percent and that he would continue to work with the company as Sales Manager under the direction and control of "Orange."	Orange had replaced him, and further, that Jim D. Parsons' salary had been reduced by 50 percent and that Mr. Orange would have full direction and control over Subsidiary.
19. The above proposal stated that "Industries" had a basically sound organization with buildings, machinery, and equipment in good condition. It stated further that "Industries" could sustain a shipping volume increase from the present $3 million of annual sales to more than $5 million without any significant capital expenditures and the manufacturing and administrative costs were reasonable. It stated further that the "new management" believed the company could show an operating profit for 1979.	18. The above proposal stated that Subsidiary had a basically sound organization with buildings, machinery, and equipment in good condition. It stated further that Subsidiary could sustain a shipping volume increase from the present $3 million of annual sales to more than $5 million without any significant capital expenditures and that manufacturing and administrative costs were reasonable. It stated further that the "new management" believed the company could show an operating profit for 1979.
20. The furnishing of a fraudulent and highly misleading statement of the assets, liabilities, and net worth of "Industries" to its	19. The furnishing of a fraudulent and highly misleading statement of the assets, liabilities, and net worth of Subsidiary to its

State Complaint

creditors, knowing the same to be false and misleading in several respects, portrayed an entirely different picture to the creditors than that which actually existed on November 30, 1978, and on the date of the proposal, viz., December 21, 1978.

21. A relatively small number of the creditors of "Industries" accepted the proposal submitted to them. At no time did "Parsons," or any employee, officer or director of "Industries," with the exception of "Orange," agree to the proposed composition of creditors, nor the approach taken. In fact, "Parsons" repeatedly told "Orange" and "Herbert" that it would not work and would be a financial disaster for "Industries" and that the creditors simply wouldn't buy the proposal. "Orange" and "Herbert" refused to listen to "Parsons" and placed him him in a subordinate position in the operation and management of the company as shown by the Kaufman proposal and the actual day-to-day operations at the plant site and otherwise.

Federal Complaint

creditors, by Defendant and Mr. Orange, knowing the same to be false and misleading in several respects, portrayed an entirely different picture to the creditors than that which actually existed on November 30, 1978, and on the date of the proposal, viz., December 21, 1978. A relatively small number of the creditors of Subsidiary accepted the proposal submitted to them. At no time did Parent agree to the proposed composition of creditors, nor the approach taken. In fact, Jim D. Parsons repeatedly told Mr. Orange and Mr. Herbert that it would not work and would be a financial disaster for Subsidiary, and that the creditors simply wouldn't buy the proposal. Mr. Orange and Mr. Herbert placed Jim D. Parsons in a subordinate position in the operation and management of Subsidiary, as shown by the Kaufman proposal and the actual day-to-day operations at the plant site and otherwise. Defendant, acting by and through its officer, agent, and employee Mr. Herbert, because of its posi-

State Complaint	Federal Complaint
The Defendant "First Alabama," acting by and through its officer, agent, and employee "Herbert," because of its position, exercised almost total control over "Parsons" and "Industries" at this time.	tion of power, exercised total control over Subsidiary at this time.
22. The information supplied by Attorney Kaufman, at the request and under the direction of "Orange" and "Herbert," and subsequently mailed to all creditors of "Industries," was false and misleading in several material and pertinent facts as set out herein. Said proposal substantially mistated the financial condition of "Industries" to the creditors. Defendants "Orange" and "Herbert," individually, and as an officer, agent, or servant of "First Alabama," knew the information supplied to creditors to be false and misleading, and, by their active participation in the preparation and dissemination of same to creditors, knowingly misled said creditors to the actual detriment of the creditors and Plaintiffs.	20. The information supplied by Attorney Kaufman, at the request and under the direction of Mr. Orange and Mr. Herbert, and subsequently mailed to all creditors of Subsidiary, was false and misleading in several material and pertinent facts as set out herein. Said proposal substantially mistated the financial condition of Subsidiary to the creditors. Defendant knew the information supplied to creditors to be false and misleading, and, by its active participation in the preparation and dissemination of same to creditors, knowingly misled said creditors to the actual detriment of the creditors and Plaintiffs.

State Complaint

23. On a date in January of 1979, prior to January 9, when it became evident that the creditors would not accept the proposed composition, "Herbert" advised "Parsons" in a private conversation that the Bank would no longer finance the business operations of "Industries," nor would "Industries" be given additional time to secure other financing from other sources. On or about January 9, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that all of the indebtedness of "Industries" would be due and payable on January 15, 1979, and that no additional time would be given to said company. The amount of the total indebtedness owed by "Industries" was stated to be $1,076,486.00 in principal with $33,925.13 interest as of said date.

24. On or about January 11, 1979, "Orange" notified "Parsons" in writing that he was rescinding their agreement and that his working with "Industries" was not serving any purpose, which in effect gave notice that "Orange" would "cancel" his agreement with

Federal Complaint

21. On January 9, 1979, Defendant advised Jim D. Parsons that Defendant would no longer finance the business operations of Subsidiary, nor would Subsidiary be given additional time to secure other financing from other sources. On or about January 9, 1979, Defendant notified Subsidiary that all of its indebtedness to Defendant, stated as $1,076,486.00 in principal with $33,925.13 interest, would be due and payable on January 15, 1979, and that no additional time would be given to said company.

22. On or about January 11, 1979, Mr. Orange notified Jim D. Parsons that he (Mr. Orange) would "cancel" his agreement with Subsidiary (his resignation required six months to take effect) and, thus, resign as Chief Executive Officer.

State Complaint	Federal Complaint
"Industries" which required six months to take effect and, thus, resign as Chief Executive Officer at the expiration of the stated time.	
25. On or about January 15, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that all assets secured under the security agreements were being taken in and that physical possession would be taken by "First Alabama" on said date.	23. On or about January 15, 1979, Defendant notified Subsidiary that all assets secured under the security agreements were being taken in and that physical possession would be taken by Defendant on said date.
26. On or about January 15, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that "First Alabama" would sell all collateral security to satisfy the aforesaid loans at "Herbert's" office on January 17, 1979, at 2:00 p.m.	On or about January 15, 1979, Defendant notified Subsidiary that Defendant would sell all collateral security to satisfy the aforesaid loans at Mr. Herbert's office on January 17, 1979 at 2:00 p.m.
27. On or about January 17, 1979, a private sale of the assets of "Industries" was made by "First Alabama" to "OSI," at 10:00 a.m. (two hours prior to the notice time), which purported to convey all rights and title in and to the said property and assets for a sales price of $907,000.00. A bill of sale was executed and	24. On or about January 17, 1979, a private sale of the assets of Subsidiary was made by Defendant to OSI, Inc., at 10:00 a.m. (four hours prior to the notice time), which purported to convey all rights and title in and to the said property and assets for a sales price of $907,000.00. A bill of sale was executed and delivered by

State Complaint	Federal Complaint
delivered by "First Alabama" to "OSI" on January 17, 1979, at 10:10 a.m., purportedly conveying for the consideration of $907,252.65 certain described personal property of "Industries."	Defendant to OSI, Inc. on January 17, 1979, at 10:10 a.m., purportedly conveying for the consideration of $907,352.65 certain described personal property of Subsidiary.
28. At all material times in 1978, and specifically from November 30, 1978, to January 17, 1979, "Herbert" and "Orange" were working in concert to acquire the business owned and operated by "Industries" in Montgomery County, Alabama for "Orange." The methods by which "Orange" took possession and obtained title to the assets and properties of "Industries" could never have happened as it did without the active participation and assistance of "Herbert," an officer, agent, and employee of "First Alabama."	25. At all material times in 1978, and specifically from November 30, 1978, to January 17, 1979, Mr. Herbert and Mr. Orange were working in concert to acquire the business owned and operated by Subsidiary in Montgomery County, Alabama for Mr. Orange. The methods by which Mr. Orange took possession and obtained title to the assets and properties of Subsidiary could never have happened as it did without the active participation and assistance of Mr. Herbert, a key officer, agent, and employee of Defendant.
29. The relationship between "Herbert" and "First Alabama" was, at all times pertinent hereto, that of agent and principal; the relationship between "First Alabama" and "Industries" was, at all times pertinent hereto, much more than that of banking institu-	26. The relationship between Mr. Herbert and Defendant was, at all times pertinent hereto, that of agent and principal; the relationship between Defendant and Subsidiary was, at all times pertinent hereto, much more than that

State Complaint

tion and regular customer, the exact relationship being one of trust as described herein; the relationship between "Orange" and "Industries" as of December 14, 1978 to the present and certainly at the time of his letter dated January 11, 1979, giving notice of his intended resignation (which required six months to take effect) was that of Chief Executive Officer and employer and/or agent and principal. Both "Herbert" and "Orange" owed certain duties and responsibilites to their respective employers, the stockholders of both "First Alabama" and "Industries," and to all parties Plaintiff hereto. Their special relationship with "Industries" provided them with certain valuable confidential and insider-type information that only a person in their respective positions could have obtained concerning the operations of the business of "Industries," its assets and liabilities, its customers and contacts, and other information which could later be used to their mutual advantage.

Federal Complaint

of banking institution and regular customer, the exact relationship being one of trust as described herein; the relationship between Mr. Orange and Subsidiary as of December 14, 1978 to the present and certainly at the time of his letter dated January 11, 1979, giving notice of his intended resignation (which required six months to take effect) was that of Chief Executive Officer and employer and or agent and principal. The special relationship of Mr. Herbert and Mr. Orange with Subsidiary provided them with certain valuable confidential and insider-type information that only persons in their respective positions could have obtained concerning the operations of the business of Subsidiary, its assets and liabilities, its customers and contacts, and other information which could later be used to their mutual advantage.

State Complaint

30. The sale of the assets of "Industries" to "OSI," a corporation newly created in January of 1979, for the sole purpose of obtaining the assets and properties of "Industries," was not handled in a commercially reasonable manner, in that acquisition and sale of a highly complicated and complex manufacturing firm was completely transacted in less than two days with the price paid by "OSI" being substantially less than the market value of the assets and properties purported to be sold. In addition thereto, no given an opportunity to inspect the properties and submit bids. Said sale was not handled in conformity with reasonable commercial practices, nor was the property and assets sold for the fair market value thereof. The letter from "Herbert," on behalf of "First Alabama," dated January 15, 1979, to "Parsons" giving notice of the aforesaid private sale actually gave notice of sale to "Standard Steel Building Systems, Inc." and not of a sale to "OSI." This notice was given and received by the parties

Federal Complaint

27. The sale of the assets of Subsidiary by Defendant to OSI, Inc., a corporation newly created in January of 1979, for the sole purpose of obtaining the assets and properties of Subsidiary, was not handled in a commercially reasonable manner, in that acquisition and sale of a highly complicated and complex manufacturing firm was completely transacted in less than two days with the price paid by OSI being substantially less than the market value of the assets and properties purported to be sold. In addition thereto, no additional persons or firms, who could have been purchasers, were given an opportunity to inspect the properties and submit bids. Said sale was not handled in conformity with reasonable commercial practices, nor were the property and assets sold for the fair market value thereof.

State Complaint	Federal Complaint
thereto on January 15, 1979. At said date, "Parsons" was required by "Herbert" to sign a letter which had been prepared by "Herbert" (or at his discretion) which was explained by "Herbert" and purported to be a Waiver of Notice.	
31. On or about the 2nd day of January, 1979, and at all times thereafter, "Herbert" put great pressure on "Parsons" to require "Industries" to either (a) pay the indebtedness in full or (b) put "First Alabama" in possession of the assets and properties of "Industries" which would have put "Industries" out of business. At no time prior to said date had "Herbert," nor any other person on behalf of "First Alabama," given any indication that "First Alabama" would discontinue financial arrangements with "Industries" and/or "Parsons." In fact, "Parsons" had been led to believe that "First Alabama" would renew all of said loans and continue to finance "Industries" operations.	28. On or about the 2nd day of January, 1979, and at all material times thereafter, Defendant put great pressure on Subsidiary to require Subsidiary to either (a) pay the indebtedness in full or (b) put Defendant in possession of the assets and properties of Subsidiary which would have put the corporation out of business. At no time prior to said date had Defendant given any indication that it would discontinue financial arrangements with Subsidiary. In fact, Jim D. Parsons had been led to believe that Defendant would renew all of said loans and continue to finance the corporation's operations. Defendant made many unsecured loans to Jim D. Parsons at interest rates as low as 5% just prior to the above takeover.

State Complaint	Federal Complaint
32. The Defendant "First Alabama," acting by and through its officers, agents, or employees, including "Herbert," the Defendant "Herbert," individually, and as an officer, agent, or employee of "First Alabama," the Defendant "OSI," acting by and through its officers, agents, or employees, including "Orange," the Defendant "Orange" acting individually and as an officer, agent, or employee of "OSI," actively participated in the scheme described hereinabove to take over the operation of the business affairs of "Industries," including its assets and properties which amounted to collusion between said Defendants to do great damage and economic harm to Plaintiffs and which effectively put "Industries" out of business for all practical purposes.	29. Defendant, acting by and through its officers, agents, or employees, including Mr. Herbert, actively participated in the scheme described hereinabove to take over the operation of the business affairs of Subsidiary including its assets and properties which amounted to collusion between said Defendant and others, including Mr. Orange, to do great damage and economic harm to Plaintiffs and which effectively put Subsidiary out of business.
36. Subsequently, "First Alabama," acting by and through "Herbert," took possession of the ongoing business operations of "Industries" as set out hereinabove, taking and selling all assets and properties of said corporation.	32. Subsequently, Defendant took possession of the ongoing business operations of Subsidiary as set out hereinabove, taking and selling all assets and properties of said corporation on January 17, 1979, at a private sale to OSI, Inc., a newly formed corporation.

Excerpts From Relief Sought:

State	Federal
38. As a direct and proximate result and consequence of the acts of the Defendants described hereinabove, the Plaintiffs, separately and severally, suffered and sustained the following damages:	40. As a direct and proximate result and consequence of the acts of the Defendant described hereinabove, which violated Title 12, U.S.C.A. § 1971, et seq., the Plaintiffs, separately and severally, suffered and sustained the following damages:
a. Plaintiffs, individually and separately, sustained great damage to their general reputation in the business community, which prior thereto had been good.	a. Plaintiffs, individually and separately, sustained great damage to their general reputation in the business community, which prior thereto had been good.
b. Plaintiffs "Industries" and "Steel" sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February which has expired, and they will suffer such losses in the future.	b. Plaintiff, Parent, sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February which has expired, and they will suffer such losses in the future; the value of its stock in Subsidiary was rendered worthless and of no value (Subsidiary had assets and properties valued at approximately $2,419,945.89 as of January 17, 1979).
c. Plaintiff "Industries" sustained the loss of all of its assets and properties taken and now claimed by "First Alabama" and/or "OSI" in the value of $2,419,945.89.	c. Plaintiff, Parent, has been greatly damaged in the
d. Plaintiff "Steel" sustained a severe loss due to the	

State Complaint

serious decline in its own sales and collections due to the problems associated with the aforesaid takeover of "Industries" by defendants.

e. Plaintiff "Steel," as a result of defendants acts and actions,, has been greatly damaged in the day-to-day operation of its own business in that it has received a great deal of bad publicity, has lost business and sales, has failed to receive payments when due from its customers on accounts receivable, was forced to pay over to defendant "First Alabama" as a result of its personal guarantee real property with an appraised market value in excess of $950,000.00 losing title to the real estate as described hereinabove.

f. Plaintiff "Parsons," has been caused great worry, stress, mental anguish, and has been harrassed by defendants since the 11th day of January, 1979, all to his great damage and detriment.

g. Plaintiff "Mrs. Parsons" has been caused great worry, stress, mental anguish,

Federal Complaint

day-to-day operation of its own business in that it has received a great deal of bad publicity, has lost business and sales, has failed to receive payments when due from its customers on account receivable; and, it was forced to pay over to Defendant as a result of its personal guarantee real property with an appraised market value of $1,003,000.00, losing title to the real estate as described hereinabove.

d. Plaintiff Jim D. Parsons, lost a good job, has been caused great worry, stress, mental anguish, and has been harrassed by Defendant since the 11th day of January, 1979, all to his great damage and detriment.

e. Plaintiff Melba L. Parsons has been caused great worry, stress, mental anguish, physical problems caused by worry, tension, and stress, and has been harrassed by Defendant since the 11th day of January, 1979, her stock in Parent has greatly diminshed in value, all to her great damage and detriment.

State Complaint	Federal Complaint
physical problems caused by worry, tension, and stress, and has been harrassed by defendants since the 11th day of January, 1979, all to her great damage and detriment.	f. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.
h. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.	

EXHIBIT B

In The Circuit Court For Montgomery County, Alabama
No. CV-79-179-G
[Caption Omitted]

AMENDMENT TO COMPLAINT

COMES NOW Honorable A. Pope Gordon, Trustee in Bankruptcy for Parsons Steel Industries, Inc., Plaintiff in the above-styled action, and with leave of Court first had and obtained, hereby amends its Amended Complaint as follows:

1. By deleting the word "insolvent" from Paragraph 10 of Plaintiffs' Complaint as amended.

2. By deleting the following sentence from Paragraph 12 of Plainfiffs' Complaint as amended: "At no time prior to November 30, 1978, 'Industries' refused to pay or failed to pay any of its indebtedness to 'First Alabama'.

3. By deleting from Count II of Plaintiffs' Complaint, to add Count IX, to-wit:

COUNT IX

1. Plaintiff, Parsons Steel Industries, Inc., realleges Paragraphs 1-37 of its Amended Complaint.

2. Plaintiff, 'Industries', alleges that the disposition or sale of said Plaintiff's collateral on or about January 17, 1979, by Defendants 'First Alabama' and 'Herbert' to Defendants 'Orange' and 'OSI', hereinabove described, was conducted in a commercially unreasonably method and manner and that the time and terms of such disposition or sale was commercially unreasonable.

3. Plaintiff, Parsons Steel Industries, Inc., alleges further that reasonable notification of the time and place of said disposition or sale of said collateral was not given to said Plaintiff by Defendants 'First Alabama' or 'Herbert'.

4. Said Plaintiff alleges further that Defendants 'Orange' and 'OSI', as purchasers of the collateral hereinabove described, failed to act in good faith in the purchase of said collateral.

5. As a direct and proximate consequence of Defendants 'First Alabama', 'Herbert', 'Orange', and 'OSI', actions described hereinabove, Plaintiff, Parsons Steel Industries, Inc., suffered the loss of all of its assets in the amount of Two Million and Three Hundred and Eighty-four Thousand and Nine Hundred and Forty-five and 89/100 ($2,384,945.89) Dollars.

WHEREFORE: Plaintiff, Parsons Steel Industries, Inc. demands judgment against all Defendants in the sum of Two Million and Three Hundred and Eighty-four Thousand and Nine Hundred and Forty-five and 89/100 ($2,384,945.89) Dollars.

5. Plaintiff, Parsons Steel Industries, Inc., further amends its Complaint to add Count X, to-wit:

COUNT X

1. Plaintiff realleges Paragraphs 1-37.

2. Defendants 'Orange' and 'OSI' (by and through its predecessor in title, Standard Steel Building Systems, Inc.), on or about January 12, 1979, executed and delivered to Plaintiff, Parsons Steel Industries, Inc., a promissory note, a copy of which is attached hereto as Exhibit "A", whereby said Defendants promised to pay to Plaintiff on order or demand the sum of Twenty-three Thousand and no/100 ($23,000.00) Dollars with interest thereon at the rate of Eight Percent (8%) per annum and agreed to pay a reasonable attorney's fee for collection and waived exemption from execution.

3. Said Defendants owe to Plaintiff, Parsons Steel Industries, Inc., the sum of Twenty-three Thousand and no/100 ($23,000.00) Dollars which is due on said note, plus interest at Eight Percent (8%) per annum.

WHEREFORE, Plaintiff, Parsons Steel Industries, Inc., demands judgment against said Defendants for the sum of

Twenty-three Thousand and no/100 ($23,000.00) Dollars, interest, attorney's fees and costs.

6. Plaintiff, Parsons Steel Industries, Inc., further amends its Complaint to add Count XI, to-wit:

COUNT XI

1. Plaintiff, 'Industries', alleges on information and belief that a life insurance policy with a cash value of approximately Eight Thousand and no/100 ($8,000.00) Dollars was purchased by Plaintiff, Parsons Steel Industries, Inc., on the life of Ed Hodge.

2. Plaintiff, Parsons Steel Industries, Inc., alleges that at the time Defendants 'Orange' and 'OSI' gained control of the premises of Parsons Steel Industries, Inc., said insurance policy remained on said premises and that said premises were under the direct supervision and control of Defendants 'Orange' and 'OSI'.

3. Plaintiff, Parsons Steel Industries, Inc., alleges on information and belief that Defendants 'Orange' and 'OSI' did wrongfully convert said life insurance policy and that value of same is rightfully the property of Plaintiff, Parsons Steel Industries, Inc.

WHEREFORE, Plaintiff, Parsons Steel Industries, Inc., demands judgment against Defendants 'Orange' and 'OSI' for the value of said life insurance policy of the life of Ed Hodge.

JAMES JERRY WOOD

THOMAS R. DE BRAY

Attorneys for A. Pope Gordon

EXHIBIT B

In The Circuit Court Of Montgomery County, Alabama
No. CV-79-179-G
[Caption Omitted]

AMENDMENT TO COMPLAINT

Now come the Plaintiffs in the above styled cause and with leave of court, first had and obtained, hereby amend their Complaint heretofore filed in this cause as follows:

1. Plaintiffs amend Count One by striking therefrom in paragraph 27, the following "(two hours prior to the notice time)" in its entirety and by adding in lieu thereof the following: "(four hours prior to the notice time)".

2. Plaintiffs further amend Count One by striking therefrom paragraph "34" in its entirety and by adding the following paragraphs numbered "34, 35, 36, 37, and 38."

"34. All Plaintiffs, with the exception of 'Industries' were required by 'First Alabama,' to sign and execute personal agreements guaranteeing payment of the indebtedness of 'Industries' to 'First Alabama.' At said time, said plaintiffs were told by 'Herbert' that they would have to stand good for the corporate indebtedness on the part of 'Industries.'

"35. After 'First Alabama' called the loans of 'Industries,' as set out hereinabove, on or about the 11th day of January, 1979, Plaintiffs were forced by Herbert to transfer over to 'First Alabama' as payment on said indebtedness real property owned by 'Steel' and 'Industries' with a market value in excess of $950,000.00 in satisfaction of the debts. 'Herbert' told 'Parsons' that he ('Herbert') and 'First Alabama' considered the real property part of the Bank's collateral and that it had to be conveyed to the bank. 'Herbert' claimed that there would be no further liability if Plaintiffs complied with his demands. Due to the lack of time and the power and control held and exercised by the defendants 'Herbert,' 'First Alabama,' and 'Orange,' Plaintiffs were forced to comply with 'Herbert's' demands. At 'Herbert's' request, deeds, which were prepared by attorneys

selected and employed by 'Herbert' and 'Orange,' were executed by Plaintiffs, conveying the property supposedly in satisfaction of the debts.

"36. Subsequently, 'First Alabama,' acting by and through 'Herbert,' took possession of the on-going business operations of 'Industries' as set out hereinabove, taking and selling all assets and properties of said corporation.

"37. As a result of the scheme and plan set in operation by defendants 'Herbert' and 'Orange,' as described hereinabove, Plaintiff 'Industries' lost an on-going business, including all of its assets and properties of every kind and description, was effectively rendered insovlent and left with approximately $847,000.00 owed to unsecured creditors as of January 17, 1979.

"38. As a direct and proximate result and consequence of the acts of the Defendants described hereinabove, the Plaintiffs, separately and severally, suffered and sustained the following damages:

a. Plaintiffs, individually and separately, sustained great damage to their general reputation in the business community, which prior thereto had been good.

b. Plaintiffs 'Industries' and 'Steel' sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February which has expired, and they will suffer such losses in tne future.

c. Plaintiff 'Industries' sustained the loss of all of its assets and properties taken and now claimed by 'First Alabama' and/or 'OSI' in the value of $2,419,945.89.

d. Plaintiff 'Steel' sustained a severe loss due to the serious decline in its own sales and collections due to the problems associated with the aforesaid take-over of 'Industries' by defendants.

e. Plaintiff 'Steel,' as a result of defendants' acts and actions,, has been greatly damaged in the day-to-day operation of its own business in that it has received a great deal of bad publicity, has lost business and sales, has failed to receive payments when due from its customers on accounts receivable, was forced to pay over to defendant 'First Alabama' as a result of its personal guarantee real property with an appraised market value in excess of $950,000.00, losing title to the real estate as described hereinabove.

f. Plaintiff 'Parsons,' has been caused great worry, stress, mental anguish, and has been harrassed by defendants since the 11th day of January, 1979, all to his great damage and detriment.

g. Plaintiff 'Mrs. Parsons' has been caused great worry, stress, mental anguish, physical problems caused by worry, tension, and stress, and has been harrassed by defendants since the 11th day of January, 1979, all to her great damage and detriment.

h. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.

WHEREFORE, Plaintiffs demand judgment against all Defendants in the sum of $10,000,000.00, interest, and costs."

3. Plaintiffs further amend their Complaint by striking therefrom Count Two in its entirety and by substituting in lieu thereof a new Count Two as follows:

COUNT TWO

"1. Plaintiffs re-allege paragraphs 1 through 37 of Count One of the Complaint as amended, as if set out here in full.

"2. Plaintiffs allege that Defendants acting in concert, failed to safeguard the interests of Plaintiffs in all transactions described hereinabove when they had a binding obligation to do so as a result of their respective relationships with Plaintiffs.

"3. That after the takeover described above, 'OSI' has disposed of by sale or otherwise certain assets and properties of

'Industries' for prices in excess of the amounts allocated to given items in the inventory supplied to Attorney Kaufman and subsequently furnished to creditors, as aforesaid, but for less than the market value of said assets and properties.

"4. As a proximate consequence of the Defendants' actions described hereinabove, Plaintiffs, separately and severally, were caused to sustain the following damages:

a. Plaintiffs, individually and separately, sustained great damage to their general reputation in the business community, which prior thereto had been good.

b. Plaintiffs 'Industries' and 'Steel' sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February which has expired, and they will suffer such losses in the future.

c. Plaintiff 'Industries' sustained the loss of all of its assets and properties taken and now claimed by 'First Alabama' and/or 'OSI' in the value of $2,419,945.89.

d. Plaintiff 'Steel' sustained a severe loss due to the serious decline in its own sales and collections due to the problems associated with the aforesaid take-over of 'Industries' by Defendants.

e. Plaintiff 'Steel,' as a result of defendants' acts and actions,, has been greatly damaged in the day-to-day operation of its own business in that it has received a great deal of bad publicity, has lost business and sales, has failed to receive payments when due from its customers on accounts receivable, was forced to pay over to defendant 'First Alabama' as a result of its personal guarantee real property with an appraised market value in excess of $950,000.00, losing title to the real estate as described hereinabove.

f. Plaintiff 'Parsons,' has been caused great worry, stress, mental anguish, and has been harrassed by defendants since the 11th day of January, 1979, all to his great damage and detriment.

g. Plaintiff 'Mrs. Parsons' has been caused great worry, stress, mental anguish, physical problems caused by worry, tension, and stress, and has been harrassed by defendants since the 11th day of January, 1979, all to her great damage and detriment.

h. Plaintiff 'Industries' was rendered insolvent by actions of defendants, acting in concert, as aforesaid, and lost its entire on-going business operations including, but not limited to, all assets and properties owned by it.

i. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.

WHEREFORE, Plaintiffs demand judgment against all Defendants in the sum of $10,000,000.00, interest, and costs."

4. Plaintiffs further amend their Complaint by adding thereto "Count Six, "Count Seven," and "Count Eight" as follows:

COUNT SIX

"1. On or about the 17th day of January, 1979, Defendants 'First Alabama' and 'Herbert' converted to their own use all personal property, including, but not limited to, the assets, accounts receivable, motor vehicles, and inventory of the Plaintiff 'Parsons Steel Industries, Inc.,' of the value of $2,419,945.89, the property of said Plaintiff.

"WHEREFORE, said Plaintiff demands judgment against Defendants 'First Alabama' and 'Herbert' in the sum of $2,419,945.89.

"Plaintiff further demands judgment against said defendants for punitive damages.

"Plaintiff further demands judgment against said defendants for interest and costs."

COUNT EIGHT

"1. Plaintiffs re-allege paragraphs 1 through 37 of Count One of the Complaint, as amended, as if set out here in full.

"2. Plaintiffs allege that Defendants acting in concert, failed to safeguard the interests of Plaintiffs in all transactions described hereinabove when they had a binding obligation to do as a result of their respective relationships with Plaintiffs.

"3. Plaintiffs allege that Defendants, acting in concert, participated in a fraudulent conspiracy through a plan and scheme designed to accomplish the takeover of the going business of 'Industries' for 'Orange' through 'OSI' with very little investment and without assuming the liabilities to the creditors of said company, and that the taking of the assets and properties of said company amounted to a secret conversion thereof by said defendants to the detriment of all Plaintiffs and all creditors of 'Industries.'

"4. Plaintiffs reallege paragraph 4 of Count Two, including sub-paragraphs 4.a. through 4.i. of the Complaint as if set out here in full.

WHEREFORE, Plaintiffs demand judgment against all defendants in the sum of $10,000,000.00, interest and costs."

Jere L. Beasley
Attorney for Plaintiffs

Jere L. Beasley
Attorney at Law
P.O. Box 4537
Montgomery, Alabama 36101

EXHIBIT B

In The Circuit Court For Montgomery County, Alabama

No. CV-79-179-G

[Caption Omitted]

AMENDMENT TO COMPLAINT

COMES NOW Honorable A. Pope Gordon, Trustee in Bankruptcy for Parsons Steel Industries, Inc., Plaintiff in the above-styled action, and with leave of Court first had and obtained, hereby amends its Amended Complaint as follows:

1. Following Count VIII of the Amended Complaint, to add Count IX, to wit:

Count IX

1. Plaintiff, Parsons Steel Industries, Inc., realleges Paragraphs 1-37 of its Amended Complaint.

2. Plaintiff, Parsons Steel Industries, Inc., alleges that the disposition or sale of said Plaintiff's collateral on or about January 17, 1979, by Defendants "First Alabama" and "Herbert" to Defendants "Orange" and "OSI", hereinabove described, was conducted in a commercially unreasonably method and manner and that the time and terms of such disposition or sale was commercially unreasonable.

3. Plaintiff, Parsons Steel Industries, Inc., alleges further that reasonable notification of the time and place of said disposition or sale of said collateral was not given to said Plaintiff by Defendants "First Alabama" or "Herbert".

4. Said Plaintiff alleges further that Defendants "Orange" and "OSI", as purchasers of the collateral hereinabove described, failed to act in good faith in the purchase of said collateral.

5. As a direct and proximate consequence of Defendants' "First Alabama", "Herbert", "Orange", and "OSI", actions described hereinabove, Plaintiff, Parsons Steel Industries, Inc., suffered the loss of all of its assets in the amount of Two Million

Three Hundred Eighty-Four Thousand Nine Hundred Forty-Five Dollars ($2,384,945.00).

WHEREFORE: Plaintiff, Parsons St el Industries, Inc., demands judgment against all Defendants in the sum of Two Million Three Hundred Eighty-Four Thousand Nine Hundred Forty-Five and 89/100 Dollars ($2,384,945.89).

2. Plaintiff, Parsons Steel Industries, Inc., further amends its Complaint to add Count X, to wit:

Count X

1. Plaintiff realleges Paragraphs 1-37.

2. Defendants "Orange" and "OSI" (by and through its predecessor in title, Standard Steel Building Systems, Inc.), on or about January 12, 1979, executed and delivered to Plaintiff, Parsons Steel Industries, Inc., a promissory note, a copy of which is attached hereto as Exhibit "A", whereby said Defendants promised to pay to Plaintiff on order or demand the sum of Twenty-Three Thousand Dollars ($23,000.00) with interest thereon at the rate of 8% per annum and agreed to pay a reasonable attorney's fee for collection and waived exemption from execution.

3. Said Defendants owe to Plaintiff, Parsons Steel Industries, Inc., the sum of Twenty-Three Thousand Dollars ($23,000.00) which is due on said note, plus interest at 8% per annum.

WHEREFORE, Plaintiff, Parsons Steel Industries, Inc., demands judgment against said Defendants for the sum of Twenty-Three Thousand Dollars ($23,000.00), interest, attorney's fees, and costs.

3. Plaintiff, Parsons Steel Industries, Inc., further amends its Complaint to add Count XI, to wit:

Count XI

1. Plaintiff, Parsons Steel Industries, Inc., alleges on information and belief that a life insurance policy with a cash value of approximately Eight Thousand Dollars ($8,000.00) was purchased by Plaintiff, Parsons Steel Industries, Inc., on the life of Ed Hodge.

2. Plaintiff, Parsons Steel Industries, Inc., alleges that at the time Defendants "Orange" and "OSI" gained control of the premises of Parsons Steel Industries, Inc., said insurance policy remained on said premises and that said premises were under the direct supervision and control of Defendants "Orange" and "OSI".

3. Plaintiff, Parsons Steel Industries, Inc., alleges on information and belief that Defendants "Orange" and "OSI" did wrongfully convert said life insurance policy and that value of same is rightfully the property of Plaintiff, Parsons Steel Industries, Inc.

WHEREFORE, Plaintiff, Parsons Steel Industries, Inc., demands judgment against Defendants "Orange" and "OSI" for the value of said life insurance policy of the life of Ed Hodge.

JAMES JERRY WOOD

THOMAS R. DE BRAY

Attorneys for A. Pope Gordon

OF COUNSEL:
Wood, Minor & Parnell, P.A.
P.O. Box 4189
Montgomery, AL 36101
832-4202

EXHIBIT B

In The Circuit Court For Montgomery County, Alabama
No. CV-79-179-G
[Caption Omitted]

SECOND AMENDMENT TO COMPLAINT BY DEFENDANTS PARSONS STEEL, INC., JIM D. PARSONS AND MELBA L. PARSONS

Come now Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons and pursuant to Rule 15, Alabama Rules of Civil Procedure, hereby amend their complaint heretofore filed in this cause as follows:

1. By adding to paragraph 12 of the complaint as amended the following:

> "At all times during 1978 First Alabama's loan officer, William M. Richardson, promised the continued financial support of Industries. Specifically in September, 1978, Richardson, on behalf of First Alabama, promised both to restructure the then-existing loans and to advance additional funds if Parsons would deposit an additional $100,000.00 of capital in Industries. In reliance on Richardson's promise on behalf of First Alabama, Parsons deposited $50,000.00 in Industries before being relieved of that requirement by Richardson and Bank. Plaintiff subsequently learned that Richardson had no intention of performing that promise and now denies even having made it."

2. By striking from paragraph 13 of the complaint as amended everything after the third sentence of that paragraph which ends, "for a good profit".

3. By striking from paragraph 14 of the complaint as amended the second sentence which begins, "Orange later indicated . . .".

4. By striking from the complaint as amended paragraph 15 in its entirety and substituting therefor the following:

"15. In connection with the negotiations for restructuring of the debt of Industries and the advancing of additional funds Herbert instructed Parsons to have a physical inventory of all assets of Industries performed as of November 30, 1978. Parsons employed Vilas V. Vawter and Associates, P.C., Certified Public Accountants, to assist in the inventory. The work was completed during the period November 27-28, 1978 and the information made available to the bookkeeper regularly employed by Industries. A balance sheet was prepared as of November 30, 1978 by the bookkeeper using the information supplied in the inventory and was transmitted to Herbert. This balance sheet showed, as of November 30, 1978, total assets of $2,384,945.89 with total liabilities of $1,910,747.09."

5. By adding to paragraph 16 of the amended complaint at the beginning of that paragraph the following:

"On or about December 12, 1978 Parsons and his bookkeeper met with Herbert to discuss the ongoing negotiations concerning the financial future of Industries. In that meeting, Herbert informed Parsons that First Alabama would go no further in the negotiations and would call the loans unless Orange were made chief executive officer of Industries and made the principal owner of that corporation. Herbert specifically stated that additional loans would be made to Industries if that requirement were met. Herbert has subsequently admitted that he, on behalf of First Alabama, had no intention of making additional loans to Industries at that time and in fact denies even making that promise. Prior to entering into the written agreement to carry out Herbert's instructions Parsons was informed by Orange that he would seek additional loans from First Alabama if he were made chief executive officer and majority stockholder in Industries but stated he felt that additional loans might not be necessary because of a

plan he had devised to offer preferred stock to the creditors. Orange had subsequently admitted that he had no intention of seeking additional loans from First Alabama."

6. By joining as parties to Count IX of the Trustee's amended complaint to seek damages suffered by these Plaintiffs as a result of the sale as specified in ¶ 37.

7. By adding immediately following Count Six of the complaint and immediately preceding Count Eight of the complaint the following:

COUNT SEVEN

1. Plaintiffs reallege paragraphs one through thirty-seven of count one of the complaint as amended, as if set out here in full.

2. Under the circumstances as alleged herein, Defendant Orange owed a fiduciary duty to Plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons separate and distinct from the fiduciary duty Orange owed to Industries.

3. Through his actions as alleged herein Orange breached that fiduciary duty and these Plaintiffs were damaged as a result as set out in paragraph 37 above.

WHEREFORE, Plaintiffs Parsons Steel Inc., Jim D. Parsons and Melba L. Parsons demand judgment against Defendant Mike Orange in the amount of $10,000,000.00.

8. By adding immediately following Count Eleven of the complaint as last amended:

COUNT TWELVE

1. Plaintiffs Parsons Steel Inc., Jim D. Parsons and Melba L. Parsons reallege paragraphs 1 through 37 of the complaint as amended as if set out here in full.

2. Without in any manner limiting their allegation that the actions of Defendants amounted to a fraudulent conspiracy through a plan and scheme designed to accomplish the takeover of Industries these Plaintiffs allege that Defendants made the following specific fraudulent statements:

a. First Alabama by and through its agent William M. Richardson acting at all times within his authority stated in September, 1978 that Bank would restructure the then existing debt of Industries and would advance additional funds if Parsons would deposit an additional $100,000.00 of capital into Industries.

b. On or about December 12, 1978, Herbert acting at all times as agent for First Alabama within the line and scope of his authority promised Plaintiff Jim D. Parsons that First Alabama would make additional loans and advance additional monies to Industries if Parsons would make Orange chief executive officer of Subsidiary and grant him a majority interest in Subsidiary.

c. On or about December 12, 1978, Orange stated to Plaintiff Jim D. Parsons that if his plan to offer the creditors preferred stock did not succeed, he would seek additional loans from First Alabama.

d. Both William M. Richardson and Herbert acting on behalf of First Alabama through words and actions as alleged herein led Parsons to believe that First Alabama would provide for the continuing financial needs of Industries.

3. The statements specified in paragraph 2 above were made by Defendants as a part of the conspiracy to defraud Plaintiffs and were made without the intention of performing them and specifically to induce action by these Plaintiffs.

4. These Plaintiffs relied on the statements and promises made by Defendants, acted to their detriment, and were damaged as a result as set out in paragraph 37 above.

WHEREFORE, Plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons demand judgment against Defendants in the amount of $10,000,000.00.

Respectfully submitted,

BEASLEY AND WILSON

By: FRANK M. WILSON
Attorney for Parsons Steel, Inc.,
Jim D. Parsons and
Melba L. Parsons

Of Counsel:

Frank M. Wilson
Attorney at Law
P.O. Box 4537
Montgomery, Alabama 36101

EXHIBIT B

SUMMONS
IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA
No. CV-79-179-G
[Caption Omitted]

SUMMONS

To Any Sheriff or any person authorized by Rule 4 (a) (3) of the Alabama Rules of Civil Procedure to effect service in the State of Alabama:

You are hereby commanded to serve this summons and a copy of the complaint in this action upon the defendants, namely,

First Alabama Bank of Montgomery, N.A., 8 Commerce Street, Montgomery, Alabama;
Edward Herbert, First Alabama Bank of Montgomery, N.A., 8 Commerce Street, Montgomery, Alabama;
OSI, Inc., Route 6, Box 23, 3110 Birmingham Highway, Montgomery, Alabama;
Michael Orange, Route 6, Box 23, 3110 Birmingham Highway, Montgomery, Alabama.

Each defendant is required to serve a copy of a written answer to the complaint upon

Jere L. Beasley

plaintiff's attorney, whose address is

P.O. Box 4537
Montgomery, Alabama 36101

within thirty (30) days after service of this summons excluding the day of service of the summons and to file the original of said written answer with the Clerk of this Court at the time of service of the answer upon the Attorney of Record for the Plaintiff or within a reasonable time thereafter. If any defendant fails to do

so, a judgment by default may be entered against that defendant for the relief claimed in the complaint.

Clerk of Court

Dated: February 15, 1979

COMPLAINT

COUNT ONE

1. Plaintiff Parsons Steel Industries, Inc., hereinafter referred to as "Industries," is a domestic corporation organized and existing under the laws of the State of Alabama, with its principal place of business in Montgomery County, Alabama.

2. Plaintiff Parsons Steel, Inc., hereinafter referred to as "Steel," is a domestic corporation organized and existing under the laws of the State of Alabama, with its principal place of business in Mobile County, Alabama.

3. Plaintiff Jim D. Parsons, hereinafter referred to as "Parsons," is a resident citizen of Montgomery County, Alabama. He served as President of "Industries" at all times pertinent hereto until the date of his forced resignation as described hereinbelow. He owns less than 5 percent of the capital stock of Parsons Steel, Inc., hereinabove described, and did so at all times pertinent hereto.

4. Plaintiff Melba L. Parsons, hereinafter referred to as "Mrs. Parsons," is a resident citizen of Montgomery County, Alabama. "Mrs. Parsons" owns over 95 percent of the capital stock of the said Parsons Steel, Inc., and did so at all times pertinent hereto.

5. Defendant First Alabama Bank of Montgomery, N.A., hereinafter referred to as "First Alabama," is a national banking corporation, with its principal place of business in the City of Montgomery, Montgomery County, Alabama.

6. Defendant Edward Herbert, hereinafter referred to as "Herbert," is a resident citizen of Montgomery County,

Alabama, and is employed as First Senior Vice President of "First Alabama" and was so employed at all times pertinent hereto.

7. Defendant OSI, Inc., hereinafter referred to as "OSI," is a domestic corporation organized under the laws of the State of Alabama, and was incorporated on or about January 11, 1979, with its principal place of business in Montgomery County, Alabama.

8. Defendant Michael Orange, hereinafter referred to as "Orange," a resident citizen of Montgomery County, Alabama, is believed to be the Chief Executive Officer and majority stockholder of "OSI," even though he was not listed as an original incorporator of said corporation.

9. a. At all times pertinent hereto, special relationship existed between "Industries" and "First Alabama," and between "Industries" and "Herbert," and between "Industries" and "Orange," all of which will be described hereinbelow.

b. Additionally, special relationships existed between "Orange" and "Parsons," between "Orange" and "Herbert," and between "Orange" and "First Alabama," all of which will be set out hereinbelow.

10. Plaintiff "Industries" was a going and solvent industrial concern doing business in the State of Alabama and other states, since its acquisition of a going-business on a date prior to January 1, 1976. For the years set out below, "Industries" had gross sales of: 1976 - $3,683,629.00; 1977 - $3,927,032.00; and 1978 - $3,591,839.00.

11. Plaintiff "Steel" is an industrial concern located in the City of Mobile, Alabama, which has done business throughout the Country, including Alabama, as well as internationally for several years. "Steel" owns the common stock of "Industries," but has no other legal control over the operation of "Industries," which operated under different management as a separate business. "Steel" owned and leased the real estate

upon which the business of "Industries" was physically located to said corporation at an annual rent.

12. For a substantial period of time prior to November 30, 1978, "First Alabama" loaned "Industries" a considerable amount of money for operating and other purposes in its business. "Industries" in turn executed security agreements to "First Alabama" on certain personal property and assets over the life in connection with said loans. At no time prior to November 30, 1978, did "Industries" refuse to pay or fail to pay any of its indebtedness to "First Alabama." During the life of said loans "First Alabama," acting by and through its agents, servants, or employees, including "Herbert," advised and consulted with "Industries" in its business operation and management. "Herbert" personally took over the handling of said loans on a date prior to November 30 in the year 1978 due to the fact that the employee of the bank handling the loans left the employment of "First Alabama." Subsequent to said date, "Herbert" advised and counselled with "Parsons" concerning the operation and management of "Industries."

13. On a date prior to November 30 in the year 1978, after the taking over the aforesaid loans, "Parsons" had a prospect interested in purchasing "Industries" (an out-of-state industrial concern which was attempting to purchase a location in the steel industry in a southern state). "Parsons" subsequently met with the prospective purchaser and so advised "Herbert." "Parsons," on behalf of "Industries," entered into negotiations contemplating the sale of the business and all assets for a good profit. "Herbert" subsequently advised "Parsons" that "Industries" should not be sold, but rather should continue to operate under the same management as before with no significant changes and that adequate financing would continue by "First Alabama" and that "First Alabama" preferred to deal with people they knew and trusted. "Parsons," at "Herbert's" request advised the prospect that there would be no further negotiations. At said time, the indebtedness from "Industries" to "First Alabama" was approximately $1,100,000.00.

14. On a later date and prior to November 30, 1978, "Herbert" again approached "Parsons" with a request that he enter into negotiations with another prospective purchaser, namely, "Orange." Shortly thereafter "Orange" came to "Industries' " location and looked over the operation. "Orange" later indicated to "Parsons" that he was not interested in purchasing the business, but planned to take over the management of "Industries" at the request and under the direction of "First Alabama" and "Herbert."

15. Subsequent to the events alleged in paragraph 14, a local attorney, namely Samuel Kaufman, at the direction of "Herbert" and "Orange" was employed to represent "Industries" to bring about a proposed composition of creditors. "Herbert" instructed "Parsons" to secure a certified audit of the assets and liabilities of "Industries" for distribution to all creditors of "Industries." "Parsons" then employed Vilas V. Vawter and Associates, P.C., Certified Public Accountants, to comply with "Herbert's" instructions. The work was completed by the accounting firm during the period November 27-28, 1978, and the information made available to the bookkeeper regularly employed by "Industries." A balance sheet on "Industries" was subsequently prepared as of November 30, 1978, by said bookkeeper, using the information supplied by the accounting firm and transmitted to "Orange." This balance sheet showed, as of November 30, 1978, total assets of $2,384,945.89 with total liabilities of $1,910,747.09. "Orange" and "Herbert" refused to use this information and instead supplied information to Kaufman reducing the total assets of "Industries" from $2,384,945.89 to $1,034,000.00.

16. On or about December 14, 1978, "Orange" became Chief Executive Officer of "Industries" on direct insistance of "First Alabama" and "Herbert." At said time, at the request of "Herbert," "Parsons" resigned as President of "Industries."

17. There was no significant change in the assets or inventory maintained by "Industries," nor in the liabilities of said company from November 27, 1978 to January 17, 1979.

18. Attorney Kaufman, at the request of "Orange" and "Herbert," sent a letter to all creditors of "Industries" dated December 21, 1978, which in effect proposed a common law composition of creditors. This proposal was conceived by "Orange" with the overt concurrence of "Herbert." The proposal, mailed to all creditors, listed the assets of Industries at "approximately $1,034,000.00" with liabilities of "approximately $1,948,000.00" and with a negative net worth of "approximately $914,000.00. The proposal stated that it was prepared by the management of "Industries," and stated further that "First Alabama" held a secured position as against all creditors to the extent of $1,200,000.00. The proposal stated further that "First Alabama" had refused to continue to carry "Industries' " loans unless "Industries" brought in new management, and further that "First Alabama" located "Orange" to fill this newly created management role. The proposal stated further that "First Alabama" conditioned restructuring of the existing debt of "Industries" upon acceptance of "Orange" to assume the position of President and Chief Executive Officer of "Industries" and that "Orange" had already assumed the management of "Industries." The proposal stated further that "Parsons" had resigned as President and Chief Executive Officer of "Industries" and that "Orange" had replaced him, and further, that "Parsons' " salary had been reduced by 50 percent and that he would continue to work with the company as Sales Manager under the direction and control of "Orange."

19. The above proposal stated that "Industries" had a basically sound organization with buildings, machinery, and equipment in good condition. It stated further that "Industries" could sustain a shipping volume increase from the present $3 million of annual sales to more than $5 million without any significant capital expenditures and the manufacturing and administrative costs were reasonable. It stated further that the "new management" believed the company could show an operating profit for 1979.

20. The furnishing of a fraudulent and highly misleading statement of the assets, liabilities, and net worth of "Industries" to its creditors, knowing the same to be false and misleading in several respects, portrayed an entirely different picture to the creditors than that which actually existed on November 30, 1978, and on the date of the proposal, viz., December 21, 1978.

21. A relatively small number of the creditors of "Industries" accepted the proposal submitted to them. At no time did "Parsons," or any employee, officer or director of "Industries," with the exception of "Orange," agree to the proposed composition of creditors, nor the approach taken. In fact, "Parsons" repeatedly told "Orange" and "Herbert" that it would not work and would be a financial disaster for "Industries" and that the creditors simply wouldn't buy the proposal. "Orange" and "Herbert" refused to listen to "Parsons" and placed him him in a subordinate position in the operation and management of the company as shown by the Kaufman proposal and the actual day-to-day operations at the plant site and otherwise. The Defendant "First Alabama," acting by and through its officer, agent, and employee "Herbert," because of its position, exercised almost total control over "Parsons" and "Industries" at this time.

22. The information supplied by Attorney Kaufman, at the request and under the direction of "Orange" and "Herbert," and subsequently mailed to all creditors of "Industries," was false and misleading in several material and pertinent facts as set out herein. Said proposal substantially mistated the financial condition of "Industries" to the creditors. Defendants "Orange" and "Herbert," individually, and as an officer, agent, or servant of "First Alabama," knew the information supplied to creditors to be false and misleading, and, by their active participation in the preparation and dissemination of same to creditors, knowingly misled said creditors to the actual detriment of the creditors and Plaintiffs.

23. On a date in January of 1979, prior to January 8, when it became evident that the creditors would not accept the proposed composition, "Herbert" advised "Parsons" in a private conversation that the Bank would no longer finance the business operations of "Industries," nor would "Industries" be given additional time to secure other financing from other sources. On or about January 8, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that all of the indebtedness of "Industries" would be due and payable on January 15, 1979, and that no additional time would be given to said company. The amount of the total indebtedness owed by "Industries" was stated to be $1,076,486.00 in principal with $33,925.13 interest as of said date.

24. On or about January 11, 1979, "Orange" notified "Parsons" in writing that he was rescinding their agreement and that his working with "Industries" was not serving any purpose, which in effect gave notice that "Orange" would "cancel" his agreement with "Industries" which required six months to take effect and, thus, resign as Chief Executive Officer at the expiration of the stated time.

25. On or about January 15, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that all assets secured under the security agreements were being taken in and that physical possession would be taken by "First Alabama" on said date.

26. On or about January 15, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that "First Alabama" would sell all collateral security to satisfy the aforesaid loans at "Herbert's" office on January 17, 1979, at 2:00 p.m.

27. On or about January 17, 1979, a private sale of the assets of "Industries" was made by "First Alabama" to "OSI," at 10:00 a.m. (two hours prior to the notice time), which purported to convey all rights and title in and to the said property and assets for a sales price of $907,000.00. A bill of sale was executed and delivered by "First Alabama" to "OSI" on January

17, 1979, at 10:10 a.m., purportedly conveying for the consideration of $907,252.85 certain described personal property of "Industries."

28. At all material times in 1978, and specifically from November 30, 1978, to January 17, 1979, "Herbert" and "Orange" were working in concert to acquire the business owned and operated by "Industries" in Montgomery County, Alabama for "Orange." The methods by which "Orange" took possession and obtained title to the assets and properties of "Industries" could never have happened as it did without the active participation and assistance of "Herbert," an officer, agent, and employee of "First Alabama."

29. The relationship between "Herbert" and "First Alabama" was, at all times pertinent hereto, that of agent and principal; the relationship between "First Alabama" and "Industries" was, at all times pertinent hereto, much more than that of banking institution and regular customer, the exact relationship being one of trust as described herein; the relationship between "Orange" and "Industries" as of December 14, 1978 to the present and certainly at the time of his letter dated January 11, 1979, giving notice of his intended resignation (which required six months to take effect) was that of Chief Executive Officer and employer and/or agent and principal. Both "Herbert" and "Orange" owed certain duties and responsibilites to their respective employers, the stockholders of both "First Alabama" and "Industries," and to all parties Plaintiff hereto. Their special relationship with "Industries" provided them with certain valuable confidential and insider-type information that only a person in their respective positions could have obtained concerning the operations of the business of "Industries," its assets and liabilities, its customers and contacts, and other information which could later be used to their mutual advantage.

30. The sale of the assets of "Industries" to "OSI," a corporation newly created in January of 1979, for the sole purpose of obtaining the assets and properties of "Industries," was not

handled in a commercially reasonable manner, in that acquisition and sale of a highly complicated and complex manufacturing firm was completely transacted in less than two days with the price paid by "OSI" being substantially less than the market value of the assets and properties purported to be sold. In addition thereto, no additional persons or firms, who could have been purchasers, were given an opportunity to inspect the properties and submit bids. Said sale was not handled in conformity with reasonable commercial practices, nor was the property and assets sold for the fair market value thereof. The letter from "Herbert," on behalf of "First Alabama," dated January 15, 1979, to "Parsons" giving notice of the aforesaid private sale actually gave notice of sale to "Standard Steel Building Systems, Inc." and not of a sale to "OSI." This notice was given and received by the parties thereto on January 15, 1979. At said date, "Parsons" was required by "Herbert" to sign a letter which had been prepared by "Herbert" (or at his discretion) which was explained by "Herbert" and purported to be a Waiver of Notice.

31. On or about the 2nd day of January, 1979, and at all times thereafter, "Herbert" put great pressure on "Parsons" to require "Industries" to either (a) pay the indebtedness in full or (b) put "First Alabama" in possession of the assets and properties of "Industries" which would have put "Industries" out of business. At no time prior to said date had "Herbert," nor any other person on behalf of "First Alabama," given any indication that "First Alabama" would discontinue financial arrangements with "Industries" and/or "Parsons." In fact, "Parsons" had been led to believe that "First Alabama" would renew all of said loans and continue to finance "Industries" operations.

32. The Defendant "First Alabama," acting by and through its officers, agents, or employees, including "Herbert," the Defendant "Herbert," individually, and as an officer, agent, or employee of "First Alabama," the Defendant "OSI," acting by and through its officers, agents, or employees, including "Orange," the Defendant "Orange" acting individually and as

an officer, agent, or employee of "OSI," actively participated in the scheme described hereinabove to take over the operation of the business affairs of "Industries," including its assets and properties which amounted to collusion between said Defendants to do great damage and economic harm to Plaintiffs and which effectively put "Industries" out of business for all practical purposes.

33. Defendants failed to act in good faith in their dealings with Plaintiffs "Parsons" and "Industries" which resulted in the take-over by "OSI" of the business operations and assets of "Industries." The fraudulent acts of Defendants described hereinabove were committed with an actual intent to deceive and thus injure and damage Plaintiffs as well as the creditors of "Industries." Plaintiffs relied on the statements and actions of Defendants described hereinabove to their detriment.

34. As a direct and proximate result and consequence of the acts of the Defendants described hereinabove, the Plaintiffs, separately and severally, suffered and sustained the following damages:

a. Plaintiffs, individually and separately, sustained severe damage to their general reputation in the business community, which prior thereto had been good.

b. Plaintiffs sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February which has expired, and they will suffer such losses in the future.

c. Plaintiff "Industries" sustained the loss of all of its assets claimed by "First Alabama" and/or "OSI" in the amount of $2,384,945.89.

d. Plaintiff "Steel" sustained a severe loss due to a decline in the value of the capital stock of "Industries," and further sustained a serious decline in its own sales due to the problems associated with the aforesaid take-over of "Industries."

e. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.

Wherefore, Plaintiffs demand judgment against all Defendants in the sum of $10,000.000.00 and costs.

COUNT TWO

1. Plaintiffs re-allege paragraphs 1 through 33 of Count One of the Complaint as if set out here in full.

2. Plaintiffs allege that Defendants separately and severally, acting in concert, failed to safeguard the interests of Plaintiffs in all transactions described hereinabove when they had a binding obligation to do so. And, further that "OSI" has disposed of by sale or otherwise certain assets and properties of "Industries" for prices in excess of the amounts allocated to given items in the inventory supplied to Attorney Kaufman, as aforesaid.

3. As a proximate consequence of the Defendants' actions described hereinabove, Plaintiffs were caused to sustain the following damages:

a. Plaintiffs, individually and separately, sustained severe damage to their general reputation in the business community, which prior thereto had been good.

b. Plaintiffs sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February which has expired, and they will suffer such losses in the future.

c. Plaintiff "Industries" sustained the loss of all of its assets claimed by "First Alabama" and/or "OSI" in the amount of $2,384,945.89.

d. Plaintiff "Steel" sustained a severe loss due to a decline in the value of the capital stock of "Industries," and further sustained a serious decline in its own sales due to the problems associated with the aforesaid take-over of "Industries."

e. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.

Wherefore, Plaintiffs demand judgment against all Defendants in the sum of $10,000.000.00 and costs.

COUNT THREE

1. Plaintiffs re-allege paragraphs 1 through 33 of Count One of the Complaint as if set out here in full.

2. Plaintiffs allege that Defendants separately and severally, acting in concert, failed to safeguard the interests of Plaintiffs in all transactions described hereinabove when they had a binding obligation to do so. And, further that "OSI" has disposed of by sale or otherwise certain assets and properties of "Industries" for prices in excess of the amounts allocated to given items in the inventory supplied to Attorney Kaufman, as aforesaid.

3. Plaintiffs request that Defendants be required to account for all profits made by said Defendants as a result of, or in connection with, the transactions described herein between Plaintiffs and Defendants or between Defendants and any third party or parties.

Wherefore, Plaintiffs request that a judgment be entered for Plaintiffs and against Defendants for the amount of all said profits made by said Defendants individually, collectively, or otherwise.

COUNT FOUR

1. On or about the 17th day of January, 1979, Defendants OSI, Inc. and Michael Orange converted to its own use all personal property, including, but not limited to, the assets, accounts receivable, motor vehicles, and inventory of the Plaintiff Parsons Steel Industries, Inc., of the value of $2,384,945.89, the property of said Plaintiff.

Wherefore, said Plaintiff demands judgment against Defendants OSI, Inc., and Michael Orange in the sum of $2,384,945.89, interest, and costs.

COUNT FIVE

1. The Plaintiff Parsons Steel Industries, Inc. claims possession from the Defendants OSI, Inc. and Michael Orange of the following described property: All personal property of Defendant Parsons Steel Industries, Inc. purported to be conveyed in that certain bill of sale from First Alabama Bank of Montgomery to OSI, Inc. dated January 17, 1979, as described therein.

2. Said Plaintiff also claims reasonable value for the hire or use thereof during its wrongful detention by the said Defendants from the 17th day of January, 1979.

Wherefore, the said Plaintiff demands judgment against Defendants OSI, Inc. and Michael Orange for the recovery of the property, or, in the alternative, the value thereof, and damages for detention in the sum of $2,384,945.89, interest, and costs.

Plaintiffs will amend their complaint, if necessary, after discovery is completed to more adequately describe the facts giving rise to their cause of action.

Jere L. Beasley
Attorney for Plaintiffs
P.O. Box 4537
Montgomery, Alabama 36101

Plaintiffs demand a jury for the trial of all issues in this cause.

Jere L. Beasley
Attorney for Plaintiffs

EXHIBIT C

In The United States District Court
For The Middle District Of Alabama
Northern Division
No. 79-249-N
[Caption Omitted]

AMENDMENT TO COMPLAINT

Now come the Plaintiffs in the above styled cause and, pursuant to Rule 15 of the Federal Rules of Civil Procedure, amend their compaint as follows:

1. Plaintiffs amend paragraph 8 by striking the original paragraph 8 in its entirety and by substituting in lieu thereof the following:

"8. During 1978, and for several years prior thereto, Defendant undertook to make loans and otherwise extend credit to Subsidiary for capital and operating purposes. The consideration for said extension of credit was pledging and assignment of all receivables, inventory, equipment, and other assets of Subsidiary to Defendant. In addition thereto, Defendant subsequently required Parent to sign a guaranty agreement up to $200,000.00 for said indebtedness, and further required an oral pledge of all real property owned by Parent in Montgomery County, Alabama (valued at approximately $1,030,000.00 by appraisal in Defendant's possession) and further, Defendant required as a condition and requirement for continuing to make loans and entend credit to the subsidiary that one Michael Orange (who was unknown to Plaintiffs) be brought in by subsidiary as the new Chief Executive Officer and that Jim D. Parsons resign as President (against his wishes) and that the said Michael Orange be given an option to purchase controlling interst in the capital stock of subsidiary."

2. Plaintiffs amend paragraph 34 by striking the original paragraph 34 in its entirety and by substituting in lieu thereof the following:

"34. The several additional requirements by Defendant as described herein as conditions to making the loans and extension of credit to Subsisiary are not additional credits, properties, or services which are related to and usually provided to a bank by a customer in connection with a loan, discount, deposit, or trust service, but were in fact additional credits, properties, or services to Defendant, other than those related to and usually provided in connection with a loan."

3. Plaintiffs amend paragraph 39 by striking the original paragraph 39 in its entirety and by substituting in lieu thereof the following:

"39. Plaintiffs were customers of Defendant for the purposes of the aforesaid Title 12, U.S.C.A. § 1971, et. seq. and specifically §§ 1972 and 1975."

"40. As a direct and proximate result and consequence of the acts of the Defendant described hereinabove, which violated Title 12, U.S.C.A. § 1971, the Plaintiffs, separately and severally, suffered and sustained the following damages:

a. Plaintiffs, individually and separately, sustained great damage to their general reputation in the business community, which prior thereto had been good.

b. Plaintiff, Parent, sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February which has expired, and they will suffer such losses in the future; the value of its stock in Subsidiary was rendered worthless and of no value (Subsidiary had assets and properties valued at approximately $2,419,945.89 as of January 17, 1979);

c. Plaintiff, Parent, has been greatly damaged in the day-to-day operation of its own business in that it has received a great deal of bad publicity, has lost business and sales, has failed to receive payments when due from its customers on account receivable; and, it was forced to pay over to Defendant as a result of its personal guarantee real property with an appraised

market value of $1,003,000.00, losing title to the real estate as described hereinabove.

d. Plaintiff Jim D. Parsons, lost a good job, has been caused great worry, stress, mental anguish; and has been harrassed by Defendant since the 11th day of January, 1979, all to his great damage and detriment.

e. Plaintiff Melba L. Parsons has been caused great worry, stress, mental anguish, physical problems caused by worry, tension, and stress, and has been harrassed by Defendant since the 17th day of January, 1979, her stock in Parent has greatly diminished in value, all to her great damage and detriment.

f. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.

WHEREFORE, Plaintiffs demand judgment for treble damages, together with their costs of this suit, including a reasonable attorney's fee, and trial by jury of all issues so triable."

Jere L. Beasley
Attorney for Plaintiff

Jere L. Beasley
Attorney at Law
P.O. Box 4537
Montgomery, Alabama 36101

EXHIBIT C
United States District Court
For The
Middle District of Alabama
No. 79-249-N
[Caption Omitted]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Jere L. Beasley,

plaintiff's attorney, whose address is: P.O. Box 4537, Montgomery, AL 36101,

and answer to the complaint which is herewith served upon you within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Jane P. Gordon
Clerk of Court

Ann Rittenour
Deputy Clerk

Date: May 30, 1979

COMPLAINT

Plaintiffs, Parsons Steel, Inc., Jim D. Parsons, and Melba L. Parsons, sue Defendant, First Alabama Bank of Montgomery, N.A. and allege:

1. This action arises under the Banking Laws of the United States, Title 12, USC, Chapter 22, as hereinafter more fully appear. Jurisdiction is conferred on this Court by Title 12, USC Section 1975.

2. Plaintiff Parsons Steel, Inc. is a domestic corporation organized and existing under the laws of the State of Alabama, with its principal place of business in Mobile County, Alabama.

3. Plaintiff Jim D. Parsons is a resident citizen of Mobile County, Alabama, at the present time. Said Plaintiff served as President of Subsidiary at all times pertinent hereto until the date of his forced resignation as described hereinbelow. He owns less than 5 percent of the capital stock of Parent and did so at all times pertinent hereto.

4. Plaintiff Melba L. Parsons is a resident citizen of Mobile County, Alabama. Said Plaintiff owns over 95 percent of the capital stock of the said Parent and did so at all times pertinent hereto.

5. Defendant, First Alabama Bank of Montgomery, N.A., is a National Banking Association organized and existing under the laws of the United States, and has its place of business in the City of Montgomery, Alabama.

6. At all times material hereto, Plaintiff Parsons Steel, Inc., hereinafter referred to as "Parent," was the owner and holder of all of the outstanding capital stock of Parsons Steel Industries, Inc., an Alabama corporation, hereinafter referred to as "Subsidiary."

7. At all times material hereto except as set forth below, Subsidiary was in the business of fabricating and selling steel building and steel products and had been so engaged for several years prior to January 17, 1979. As of January 1, 1979, the fair value of the capital stock of Subsidiary held by Parent was $1,850,000.00.

8. During 1978, and for several years prior thereto, Defendant undertook to make loans and otherwise extend credit to Subsidiary for capital and operating purposes. The consideration for said extension of credit was pledging and assignment of all receivables, inventory, equipment, and other assets of Subsidiary to Defendant. In addition thereto, Defendant subse-

quently required Parent to sign a guaranty agreement up to $200,000.00 for said indebtedness, and further required an oral pledge of all real property owned by Parent in Montgomery County, Alabama (valued at approximately $1,030,000.00 by appraisal in Defendant's possession) and further, Defendant required as a condition for making said loan that one Michael Orange (who was unknown to Plaintiffs) be brought in as the Chief Executive Officer of Subsidiary and be given an option to purchase controlling interest in Subsidiary. Because of the complexity of this case, more detail as to the facts thereof will be alleged herein.

9. At all times pertinent hereto, special relationships existed between Plaintiffs and Defendant, all of which will be described hereinbelow.

10. Subsidiary was a going and solvent industrial concern doing business in the State of Alabama and other states, since its acquisition of a going-business on a date prior to January 1, 1976. For the years set out below, Subsidiary had gross sales of: 1976 - $3,683,629.00; 1977 - $3,927,032.00; and 1978 - $3,591,839.00; and showed a net profit for each of said years.

11. Parent is an industrial concern located in the City of Mobile, Alabama, which has done business throughout the Country, including Alabama, as well as internationally for several years. Parent owns all of the capital stock of Subsidiary, but has no other legal control over the operation of Subsidiary, which operated under different management as a separate business. Parent owned and leased the real estate upon which the business of Subsidiary was physically located to said corporation at an annual rental.

12. For a substantial period of time prior to November 30, 1978, Defendant loaned Subsidiary a considerable amount of money for operating and other purposes in its business. Subsidiary, in turn, executed security agreements to Defendant on certain personal property and assets over the life in connection with said loans. At no time prior to November 30, 1978, did

Subsidiary refuse to pay, or fail to pay, any of its indebtedness to Defendant. During the life of said loans, Defendant, acting by and through its agents, servants, or employees, advised and consulted with Subsidiary in its business operation and management. A Senior Vice President, Edward Herbert, personally took over the handling of said loans on a date prior to November 30, 1978, due to the fact that the employee of the bank handling the loans left the employment of Defendant. Subsequent to said date, Mr. Herbert advised and counselled with Subsidiary concerning the operation and management of Subsidiary.

13. On a date prior to November 30, 1978, Defendant acting by and through its officer, agent, and employee, Herbert, approached Subsidiary with a request that negotiations be undertaken by Subsidiary with a prospective purchaser, namely Michael Orange. Shortly thereafter, Mr. Orange came to Subsidiary's business location and looked over the operation. Mr. Orange later indicated to Subsidiary that he was not interested in purchasing the business, but planned to take over the management of the company at the request and under the direction of Defendant.

14. Subsequent to the events alleged in paragraph 13 above, a local attorney, namely Samuel Kaufman, at the direction of Defendant and Mr. Orange, was employed to represent Subsidiary to bring about a proposed composition of creditors. Defendant instructed Subsidiary to secure a certified audit of the assets and liabilities of the company for distribution to all of its creditors. Subsidiary had employed Vilas V. Vawter and Associates, P.C., Certified Public Accountants, to comply with Defendant's instructions. The work was completed by the accounting firm during the period November 27-28, 1978, and the information made available to the bookkeeper regularly employed by Subsidiary. A balance sheet on Subsidiary was subsequently prepared as of November 30, 1978, by said bookkeeper, using the information supplied by the accounting firm and transmitted to Mr. Orange. This balance sheet showed, as

of November 30, 1978, total assets of $2,384,945.89 with total liabilities of $1,910,747.09. Mr. Orange and Mr. Herbert refused to use this information and instead supplied information to Attorney Kaufman reducing the total assets of Subsidiary from $2,384,945.89 to $1,034,000.00

15. On or about December 14, 1978, Mr. Orange became Chief Executive Officer of Subsidiary on the direct insistance of Defendant, as a condition of Defendant's renewing Subsidiary's loans and extending operating loans, letters of credit, etc., in the future. At the request of Defendant, Jim D. Parsons resigned as President of Subsidiary as a further condition of credit by Defendant.

16. There was no significant change in the assets or inventory maintained by Subsidiary nor in the liabilities of said company from November 27, 1978 to January 17, 1979.

17. Attorney Kaufman, at the request of Mr. Orange and Defendant sent a letter to all creditors of Subsidiary dated December 21, 1978, which in effect proposed a common law composition of creditors. This proposal was conceived by Mr. Orange and Defendant. The proposal, mailed to all creditors, listed the assets of Subsidiary at "approximately $1,034,000.00" with liabilities of "approximately $1,948,000.00" and with a negative net worth of "approximately $914,000.00." The proposal stated that it was prepared by the management of Subsidiary, and stated further that Defendant held a secured position as against all creditors to the extent of $1,200,000.00. The proposal stated further that Defendant had refused to continue to carry Subsidiary's loans unless Subsidiary brought in new management, and further that Defendant located Mr. Orange to fill this newly created management role. The proposal stated further that Defendant conditioned restructuring of the existing debt of Subsidiary upon acceptance of Mr. Orange by Subsidiary, to assume the position of President and Chief Executive Officer of Subsidiary, and that Mr. Orange had already assumed the management of Subsidiary. The proposal stated further that Jim D. Parsons had resigned as President

and Chief Executive Officer of Subsidiary and that Mr. Orange had replaced him, and further, that Jim D. Parsons' salary had been reduced by 50 percent and that Mr. Orange would have full direction and control over Subsidiary.

18. The above proposal stated that Subsidiary had a basically sound organization with buildings, machinery, and equipment in good condition. It stated further that Subsidiary could sustain a shipping volume increase from the present $3 million of annual sales to more than $5 million without any significant capital expenditures and that manufacturing and administrative costs were reasonable. It stated further that the "new management" believed the company could show an operating profit for 1979.

19. The furnishing of a fraudulent and highly misleading statement of the assets, liabilities, and net worth of Subsidiary to its creditors, by Defendant and Mr. Orange, knowing the same to be false and misleading in several respects, portrayed an entirely different picture to the creditors than that which actually existed on November 30, 1978, and on the date of the proposal, viz., December 21, 1978. A relatively small number of the creditors of Subsidiary accepted the proposal submitted to them. At no time did Parent agree to the proposed composition of creditors, nor the approach taken. In fact, Jim D. Parsons repeatedly told Mr. Orange and Mr. Herbert that it would not work and would be a financial disaster for Subsidiary, and that the creditors simply wouldn't buy the proposal. Mr. Orange and Mr. Herbert placed Jim D. Parsons in a subordinate position in the operation and management of Subsidiary, as shown by the Kaufman proposal and the actual day-to-day operations at the plant site and otherwise. Defendant, acting by and through its officer, agent, and employee Mr. Herbert, because of its position of power, exercised total control over Subsidiary at this time.

20. The information supplied by Attorney Kaufman, at the request and under the direction of Mr. Orange and Mr. Herbert, and subsequently mailed to all creditors of Subsidiary,

was false and misleading in several material and pertinent facts as set out herein. Said proposal substantially mistated the financial condition of Subsidiary to the creditors. Defendant knew the information supplied to creditors to be false and misleading, and, by its active participation in the preparation and dissemination of same to creditors, knowingly misled said creditors to the actual detriment of the creditors and Plaintiffs.

21. On January 9, 1979, Defendant advised Jim D. Parsons that Defendant would no longer finance the business operations of Subsidiary, nor would Subsidiary be given additional time to secure other financing from other sources. On or about January 8, 1979, Defendant notified Subsidiary that all of its indebtedness to Defendant, stated at $1,076,486.00 in principal with $33,925.13 interest, would be due and payable on January 15, 1979, and that no additional time would be given to said company.

22. On or about January 11, 1979, Mr. Orange notified Jim D. Parsons that he (Mr. Orange) would "cancel" his agreement with Subsidiary (his resignation required six months to take effect) and, thus, resign as Chief Executive Officer.

23. On or about January 15, 1979, Defendant notified Subsidiary that all assets secured under the security agreements were being taken in and that physical possession would be taken by Defendant on said date. On or about January 15, 1979, Defendant notified Subsidiary that Defendant would sell all collateral security to satisfy the aforesaid loans at Mr. Herbert's office on January 17, 1979 at 2:00 p.m.

24. On or about January 17, 1979, a private sale of the assets of Subsidiary was made by Defendant to OSI, Inc., at 10:00 a.m. (four hours prior to the notice time), which purported to convey all rights and title in and to the said property and assets for a sales price of $907,000.00. A bill of sale was executed and delivered by Defendant to OSI, Inc. on January 17, 1979, at 10:10 a.m., purportedly conveying for the consideration of $907,252.65 certain described personal property of Subsidiary.

25. At all material times in 1978, and specifically from November 30, 1978, to January 17, 1979, Mr. Herbert and Mr. Orange were working in concert to acquire the business owned and operated by Subsidiary in Montgomery County, Alabama for Mr. Orange. The methods by which Mr. Orange took possession and obtained title to the assets and properties of Subsidiary could never have happened as it did without the active participation and assistance of Mr. Herbert, a key officer, agent, and employee of Defendant.

26. The relationship between Mr. Herbert and Defendant was, at all times pertinent hereto, that of agent and principal; the relationship between Defendant and Subsidiary was, at all times pertinent hereto, much more than that of banking institution and regular customer, the exact relationship being one of trust as described herein; the relationship between Mr. Orange and Subsidiary as of December 14, 1978 to the present and certainly at the time of his letter dated January 11, 1979, giving notice of his intended resignation (which required six months to take effect) was that of Chief Executive Officer and employer and/or agent and principal. The special relationship of Mr. Herbert and Mr. Orange with Subsidiary provided them with certain valuable confidential and insider-type information that only persons in their respective positions could have obtained concerning the operation of the business of Subsidiary, its assets and liabilities, its customers and contacts, and other information which could later be used to their mutual advantage.

27. The sale of the assets of Subsidiary by Defendant to OSI, Inc., a corporation newly created in January of 1979, for the sole purpose of obtaining the assets and properties of Subsidiary, was not handled in a commercially reasonable manner, in that acquisition and sale of a highly complicated and complex manufacturing firm was completely transacted in less than two days with the price paid by OSI being substantially less than the market value of the assets and properties purported to be sold. In addition thereto, no additional persons or firms, who could have been purchasers, were given an opportunity to inspect the

properties and submit bids. Said sale was not handled in conformity with reasonable commercial practices, nor were the property and assets sold for the fair market value thereof.

28. On or about the 8th day of January, 1979, and at all material times thereafter, Defendant put great pressure on Subsidiary to require Subsidiary to either (a) pay the indebtedness in full or (b) put Defendant in possession of the assets and properties of Subsidiary which would have put the corporation out of business. At no time prior to said date had Defendant given any indication that it would discontinue financial arrangements with Subsidiary. In fact, Jim D. Parsons had been led to believe that Defendant would renew all of said loans and continue to finance the corporation's operations. Defendant made many unsecured loans to Jim D. Parsons at interest rates as low as 8% just prior to the above takeover.

29. Defendant, acting by and through its officers, agents, or employees, including Mr. Herbert, actively participated in the scheme described hereinabove to take over the operation of the business affairs of Subsidiary including its assets and properties which amounted to collusion between said Defendant and others, including Mr. Orange, to do great damage and economic harm to Plaintiffs and which effectively put Subsidiary out of business.

30. Defendant failed to act in good faith in its dealings with Plaintiffs which resulted in the takeover by OSI, Inc. of the business operations and assets of Subsidiary and the subsequent insolvency of Subsidiary. The fraudulent acts of Defendants described hereinabove were committed with an actual intent to deceive and thus injure and damage Plaintiffs as well as the creditors of Subsidiary.

31. After Defendant called the loans of Subsidiary as set out hereinabove, on or about the 11th day of January, 1979, Parent was forced by Defendant to transfer over to Defendant as payment on said indebtedness all of the real property with an appraised market value of $1,030,000.00. Defendant indicated to

officers of Parent that it held a Mortgage on said property and considered the property part of Defendant's collateral, and that it had to be conveyed to the bank in lieu of foreclosure. Due to the lack of time and the power and control held and exercised by the Defendant, Plaintiffs were forced to comply with all of Defendant's demands. At Defendant's request, deeds, which were prepared by attorneys selected and employed by Defendant, were executed by Parent, conveying the property supposedly in satisfaction of the debts.

32. Subsequently, Defendant took possession of the on-going business operations of Subsidiary as set out hereinabove, taking and selling all assets and properties of said corporation on January 17, 1979, at a private sale to OSI, Inc., a newly formed corporation, owned and managed by Mr. Michael Orange. As a result of the scheme and plan set in operation by Defendant and Michael Orange, as described hereinabove, Plaintiffs lost an on-going business, including all of its assets and properties of every kind and description. Subsidiary was effectively rendered insolvent and left with approximately $847,000.00 owed to unsecured creditors as of January 17, 1979.

33. In addition to the conditions placed on Plaintiffs by Defendant stated hereinabove, Plaintiffs Jim D. Parsons and Melba L. Parsons were forced to sign unlimited guarantees on the indebtedness of Subsidiary prior to the entry of Mr. Orange into the management of the business.

34. The several additional requirements by Defendant as described herein as conditions to making the loans and extension of credit to Subsidiary are not additonal credits, services, or securities, which are related to and usually provided to a bank by a customer in connection with a loan, discount, deposit, or trust service.

35. After Defendant demanded the said conditions and requirements on the part of Plaintiffs, Defendant, acting in concert with others, called all of the indebtedness as due and proceeded to foreclose on all of Subsidiary's assets, including the

receivables, inventory, equipment, and other business properties and proceeded further to sell same at a private sale to Mr. Orange's new corporation. (All taking place between January 8 and January 17, 1979.)

36. Defendant loaned $1,300,000.00 to OSI, Inc. (Mr. Orange) on January 12, 1979, to be used to purchase the assets and properties of Subsidiary and to acquire the real estate of Subsidiary and Parent. The only security or collateral given by OSI, Inc. to Defendant was the assets and properties of Subsidiary (which it did not own until the sale date, viz., January 17, 1979 - 5 days later) and its own capital stock (valued at $1,000.00). Mr. Orange was not required to make any personal guaranty of this loan.

37. By reason of the foregoing, Subsidiary has been place in involuntary bankruptcy and the capital stock thereof held by Parent has become worthless.

38. Under the provisions of Section 106(e) of the Bank Holding Company Act Amendments of 1970, 84 Stat. 1767, 12 USC Section 1975, Plaintiffs are entitled to recover from Defendant three times the amount of the damages sustained by them, and the costs of this suit, including a reasonable attorney's fee.

39. As a direct and proximate result and consequence of the acts of the Defendant described hereinabove, the Plaintiffs, separately and severally, suffered and sustained the following damages:

a. Plaintiffs, individually and separately, sustained great damage to their general reputation in the business community, which prior thereto had been good.

b. Plaintiff, Parent, sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February which has expired, and they will suffer such losses in the future; the value of its stock in Subsidiary was rendered worthless and of

no value (Subsidiary had assets and properties valued at approximately $2,419,945.89 as of January 17, 1979);

c. Plaintiff, Parent, has been greatly damaged in the day-to-day operation of its own business in that it has received a great deal of bad publicity, has lost business and sales, has failed to receive payments when due from its customers on accounts receivable and, it was forced to pay over to Defendant as a result of its personal guarantee real property with an appraised market value of $1,030,000.00, losing title to the real estate as described hereinabove.

d. Plaintiff Jim D. Parsons, lost a good job, has been caused great worry, stress, mental anguish, and has been harrassed by Defendant since the 11th day of January, 1979, all to his great damage and detriment.

e. Plaintiff Melba L. Parsons has been caused great worry, stress, mental anguish, physical problems caused by worry, tension, and stress, and has been harrassed by Defendant since the 17th day of January, 1979, her stock in Parent has greatly diminshed in value, all to her great damage and detriment.

f. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.

WHEREFORE, Plaintiffs demand Judgment for treble damages, together with their costs of this suit, including a reasonable attorney's fee, and trial by jury of all issues so triable.

JERE L. BEASLEY
Attorney at Law
P.O. Box 4537
Montgomery, Alabama 36101

EXHIBIT D

In The United States District Court
For The Middle District Of Alabama
Northern Division
No. 79-249-N
[Caption Omitted]

ORDER AND JUDGMENT

In accordance with the Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that the Defendant's motion to vacate and dismiss filed herein March 24, 1981, be, and the same is hereby, denied. It is further

ORDERED, ADJUDGED and DECREED by this Court that judgment notwithstanding the verdict be, and the same is hereby, entered in favor of Defendant; that the Plaintiffs take nothing by their complaint herein; and that the costs of this proceeding are hereby taxed against the Plaintiffs, for which execution may issue. It is further

ORDERED by this Court that Defendant's alternative motion for new trial filed herein March 24, 1981, be, and the same is hereby, denied as moot, and the above-styled cause is hereby dismissed.

DONE this 17th day of June, 1981.

R. E. Varner
United States District Judge

OPINION

This cause, having come on for trial before a jury and resulting in a verdict in favor of the Plaintiffs,[1] is now submitted to the Court on the Defendant's post-trial motions. The Plaintiffs sued the Defendant Bank, claiming a violation of that provision of the Bank Holding Company Act (hereinafter BHCA)

prohibiting any such bank from extending credit on the condition "that the customer provide some additional * * * property or service to the bank other than those related to and usually provided in connection with a loan" [12 U.S.C. § 1972 (1)(C)]. Jurisdiction of this Court is invoked pursuant to 12 U.S.C. § 1975. The Plaintiffs contend that the Defendant Bank, as a condition of an extension of credit (both a forebearance on an existing debt and a proposed additional loan which was not made) required the Plaintiffs to change the management of their business and to change to ownership of their business and that the requirement of the change of both constituted an unusual banking practice. The Bank, in defense, contends (1) that it never offered to extend further credit to the Plaintiffs at the time of the allegedly offensive conduct as it had already loaned the Plaintiffs to the extent of their credit; (2) that it made no requirement that Plaintiffs change management and ownership; (3) that even a change of management of ownership would not have been an unusual banking practice under the conditions in existence at pertinent times; (4) that the Bank's only interest was in maintaining a well-secured loan; (5) that no unusual banking practice occurred; (6) that there is no evidence of a "tie-in" within the meaning of the BHCA; and (7) that there is no evidence of any causal connection between the alleged BHCA violation and the alleged injury. These matters are raised by the Defendant Bank's motions for judgment notwithstanding the verdict and for new trial.

---

[1] This Court, recognizing certain apparent weaknesses in the Plaintiffs' case as to liability and the necessary additional expenses of preparation for trial on the issue of damages, bifurcated the case, and the jury has not yet heard the evidence on the issue of damages.

The test of whether such motions should be granted is laid out in *Comfort Trane Air Conditioning v. Trane Co.*, 592 F.2d 1373 (5th Cir. 1979), citing *Boeing Co. v. Shipman*, 411 F.2d 365, 374-375 (5th Cir. 1969) [en banc]:

> "On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the testimony - not just that evidence which supports the non-mover's case - but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury."

See, also, *Accord McCullough v. Beech Aircraft Corp.*, 587 F.2d 754, 758 (5th Cir. 1979); *Wansor v. George Hantscho Co.*, 570 F.2d 1202, 1207 (5th Cir. 1978).

Defendant Bank relies heavily on the recent ruling by the First Circuit Court of Appeals in *B. C. Recreational Industries v. First National Bank,* 639 F.2d 828 (1st Cir. 1981). The core issue in *Recreational Industries* was whether the plaintiff had stated a cause of action for a violation of 12 U.S.C. § 1972 by the bank. In *Recreational Industries,* the plaintiff alleged that the bank forced the plaintiff to hire a third party specified by the bank to manage the business. It was further alleged that this third party then insisted on increasing plaintiff's line of credit with its suppliers, thus increasing the debt owed the bank at high interest rates. This management policy, allegedly carried out in concert with and at the request of the bank, resulted in plaintiff's claim. That court, in ruling adversely to the plaintiff, noted that the legislative history of § 1972 reveals that it was aimed at preventing the use of a bank's economic power to lessen competition or engage in unfair competitive practices. Senate Report No. 1084, 91st Congress, 2nd Ses., reprinted in [1970], U.S. CODE,

Cong. & Ad. News, pp. 5519, 5535. The legislative history further provides that the statute is not intended to "interfere with the conduct of appropriate traditional banking practices." *Id.*; see, also, *McCoy v. Franklin Savings Assn. & Mortgage Management Co.*, 636 F.2d 172 (9th Cir. 1980); *Clark v. United Bank of Denver National Assn.*, 480 F.2d 235, 238 (10th Cir. 1973). Similarly, in *Sterling Coal v. United American Bank*, 470 F.Supp. 964, 965 (E.D. Tenn. 1979), the court noted that the BHCA "does not prohibit attempts by banks to protect their investments." The plaintiff in *Recreational Industries* argued that the forced hiring of a third-party manager was in violation of 12 U.S.C. § 1972 (1)(C). That court noted that, although the new management may have provided additional security in the form of management control, such did not come within the ambit of "additional credit, property or service". Therefore, the court concluded that the plaintiff failed to state a cause of action for violation of 12 U.S.C. § 1972. See, also, *Tose v. First Pennsylvania Bank*, Cases No. 80-2123 and 80-2334 (3rd Cir., 4/30/81).

The instant case, however, involves a claim that the Bank required a change of, not only management, but also controlling ownership to a person who was formerly a customer of the Defendant Bank. Plaintiffs and all witnesses in the instant case admit that a change of management, absent a requirement of a change of ownership, is not an unusual banking practice.

This case evolves from the processing of a series of loans by The First National Bank of Montgomery and its successor, The First Alabama Bank of Montgomery, with Parsons Steel of Montgomery, a corporation. Mrs. James Parsons owned 98 percent of the stock of Parsons Steel, and Mr. James Parsons (who considered his wife's stock his own) owned one percent of the stock of Parsons Steel. Mr. Parsons signed as surety of Parsons Steel on the notes involved, and Mrs. Parsons joined as surety on one of the notes. The loan officer originally handling the loan was a Mr. Richardson, who left the Bank in the fall of 1978, and the loan was thereafter assigned to a Mr. Herbert, a

vice president and officer of the Bank who contemplated either making another loan or renegotiating or collecting the existing indebtedness of Parsons Steel of Montgomery to the Bank in the fall of 1978.

Mr. Richardson testified that he had stated to Mr. Parsons prior to leaving the Bank that the Bank would extend no further credit to Parsons Steel of Montgomery because of then-existing problems with the loan. Mr. Richardson admitted having previously talked to Mr. Parsons about refinancing a $600,000.00 debt to the Bank if the problems could be cured. Mr. Herbert, the succeeding loan officer, testified that, after he reviewed the status of the business of Parsons Steel of Montgomery and discussed the matter with Mr. Parsons, he also concluded that no further money could be loaned to Parsons Steel.

During Mr. Richardson's tenure as loan officer, efforts were made to sell Parsons Steel of Montgomery to an organization referred to by witnesses as Ajax in the summer of 1978, and one of the reasons that the proposed sale to Ajax failed to materialize was that Ajax did not have sufficient credit to borrow sufficient money from the First Alabama Bank to buy the business (about one and one-half million dollars) and Mr. Parsons was unwilling to continue his assumption of any part of the obligations of the business upon transfer thereof. After the Ajax proposal failed to materialize, one or more of the Bank's officers suggested that a Mr. Orange of the City of Montgomery, Alabama, might be interested in purchasing the business. Upon their suggestion, Messrs. Parsons and Orange made contact and eventually agreed that Mr. Orange would assume the management of the business and would have an option for at least one year to purchase 55 percent of the stock of the business for a nominal sum.[2] Mr. Orange was, in addition to the stock option, to receive a salary of $10,000.00 for a year's work. Mr. Orange testified without contradiction that he made the proposal to Mr. Parsons that he would work for $55,000.00 a year and a stock option of ten percent of the stock or $10,000.00 a year and a stock option of 55 percent of the stock.

Mr. Orange further testified that the problem was that cash commensurate with paying a manager to operate the business allegedly worth over one million dollars was likely to be difficult for a business with very little cash flow, and he gave Mr. Parsons the option of deciding which way Mr. Orange would work. Mr. Orange testified further that there were several other proposals and that Mr. Parsons ultimately selected the option that Mr. Orange would receive $10,000.00 a year salary and an option to purchase 55 percent of the stock for $100.00. In December, 1978, Mr. Orange took over the management of the business and operated it until early January, 1979, when he resigned because he found the business in worse shape than Mr. Parsons had led him to believe. On January 8, 1979, Mr. Herbert, the loan officer at the Bank, reviewed the files and, finding Parsons Steel of Montgomery seriously in arrears, commenced foreclosure proceedings against Parsons Steel. On that date, Mr. Parsons went into the Bank and signed waivers in which he acknowledged full notice of foreclosure proceedings and waived other notice normally to be given him with full knowledge that Mr. Orange was to purchase the business for an amount sufficient to pay the Bank the full amount owed it. Mr. Parsons told Mr. Herbert that he was glad it was over and that he was through and was returning to Mobile to his other business.

---

[2] This option was never exercised and has lapsed, but it seems to be the basis of the claim that the Bank required a change of ownership.

The transactions from which this cause of action arose commenced during the review of the loan and credit of Parsons Steel in November and December, 1978. During those months after Mr. Herbert took custody of the loan as loan officer (and no complaint is made that Mr. Richardson did anything wrong), Mr. Parsons apparently made some contact with Mr. Herbert and stated that he would in the future need some additional

loan. At that time, the Parsons' Mobile business and the Montgomery plant site were not encumbered to the Bank except to the extent of $200,00.00 and Mr. Parsons' home was not a part of the security for the indebtedness. These matters were discussed, and eventually the conversations evolved to the extent that Mr. Parsons sent in a financial statement as of November 30, 1978. In conversations, Mr. Herbert eventually learned that Mrs. Parsons owned 98 percent of the stock of Parsons Steel and that Parsons Steel was practicing various deceptive practices such as holding already written and executed checks for some days so that the check stubs would show payment of obligations whereas the Bank accounts would reflect the proceeds in the account and such as the listing of disputed claims as current assets receivable even though many of these claims were actually in litigation. There having previously been some discussion between Messrs. Herbert and Parsons in regard to the selling of the business by Mr. Parsons to Mr. Orange, Mr. Herbert told Mr. Parsons, among other things, that the Bank would not make any further loan unless Mr. Orange was taken in as manager of the business. The Plaintiffs alleged and sought to prove that Mr. Herbert also insisted that, in addition to hiring Mr. Orange as manager, a controlling amount of the stock of Parsons Steel be transferred to Mr. Orange. The only witness who testified to this was Mrs. Jean Wiggins, a bookkeeper for Parsons Steel of Montgomery, who testified that she was in Mr. Herbert's office with Mr. Parsons when Mr. Herbert told Mr. Parsons this. Mr. Herbert denied this, and Mr. Parsons, himself, did not clearly make any such statement.

Whether or not a proposal for change of ownership was made by Mr. Herbert, Mr. Parsons and Mr. Orange entered into an agreement prepared by a lawyer employed and paid by Mr. Parsons that Mr. Orange would work as manager of Parsons Steel of Montgomery for one year for $10,000.00 and an option to buy 55 percent of the stock for $100.00. No loan was involved directly in this transaction, though the Bank had not then instigated foreclosure proceedings. Mr. Parsons and Mr. Orange mutually participated in several plans to satisfy the demands of

the creditors of Parsons Steel. They sought to obtain an agreement for the composition of creditors, and they considered issuance of stock to their creditors and also considered bankruptcy. Yet, during all these maneuvers, additional Bank loans were not mentioned, and no loan application was mentioned.

Both Herbert and Parsons agree that the original contact between Orange and Parsons was Herbert's suggestion that Orange was interested in buying the business from Parsons and that the proposal evolved from the Bank's knowledge of the prior attempt by Mr. Parsons to sell the business to Ajax. Mr. Orange testified explicitly that he and Parsons worked out the arrangement for partial ownership and management of the business. Parsons' lawyers - Messrs. Waller and Kaufman[3] testified that, during the proceeding, they understood that both Orange and Parsons were negotiating for the best transaction that each could manage; that the negotiations appeared to be between Orange and Parsons; but that the Bank was interested in the final result. No further loan was made and there were no documents, loan application or note showing that any application for a loan was made after Mr. Richardson left the Bank as a loan officer. The only loans made by the Bank to Parsons Steel of Montgomery were negotiated apparently in good faith by Mr. Richardson and Mr. Parsons, and Mr. Parsons makes no complaint about those loans.

---

[3] The testimony of the two attorneys who put together the Parsons-Orange transactions illustrates only that the Bank was interested in a normal creditor-debtor way - not that the Bank required a change of management and ownership of Parsons Steel.

Mr. Parsons' contention is that Mr. Herbert, as agent for the Bank, required Mr. Parsons to transfer the management and controlling ownership of Parsons Steel of Montgomery on agreement to transfer 55 percent of the ownership to Mr. Orange as a condition of a credit transaction relating thereto.

While Mr. Parsons admits that a requirement for a transfer of management is not an unusual banking practice as proscribed by the BHCA, he insists that a requirement that substantial ownership of said business be so transferred is an unusual banking practice and is proscribed by the BHCA.

Defendant insists that there is no evidence from which a reasonable jury could find that Mr. Herbert made any condition to an extension of credit, that there was any extension of credit and, if Mr. Herbert made a condition for the extension of credit, that the same was an unusual banking practice as proscribed by the BHCA.

THE LOAN

Mr. Parsons testified that Mr. Herbert never mentioned any specific sum of money to be loaned except when he, in discussing the need for a full financial statement from Mr. Parsons in November, 1978, stated that, "We need all this information. I don't want you borrowing a quarter of a million when you need $600,000." At that time, the Bank did not know the financial condition of Parsons Steel, and there was no occasion for a change in management or ownership. This Court is of the opinion that no reasonable person would conclude from that conversation that the Bank agreed to lend either figure. Mr. Parsons bases his contention upon the fact that Mr. Herbert implied that he would make such a loan by statements such as, "Let's get this information straight, we can work it out." According to Mr. Parsons, Mr. Herbert's (and, thereby, the Bank's) strongest proposal was made on December 12, 1978, that, "Unless you take Orange in on management, the Bank will go no further." Parsons' testimony conflicts with that of his bookkeeper, who testified that Mr. Herbert told Mr. Parsons that Mr. Herbert would make a loan if Mr. Orange was taken in for management and ownership of stock. She had no idea of the size or terms of the proposed loan.

The only paper mentioning a loan in the fall or winter of 1978 was a notation made by Mr. Richardson before Mr. Herbert

took over the account, "As of October 1, we will close a $600,000 loan secured by all property." Richardson testified this would be a consolidation of pre-existing debts. Mr. Parsons said that Mr. Herbert's proposal for additional loans between $250,000.00 and $600,000.00 involved a mortgage of all property of Mr. and Mrs. Parsons, including the property of the Mobile Company, the Parsons' home and the realty on which the Montgomery Company was located. Mr. Parsons admitted that part of this agreement was that he would keep an account of $100,000.00 in the Bank and that he never had over $50,000 in such an account. No such deposit and no such mortgage was ever made, and Mr. Parsons never testifed that he agreed to any such mortgage. Indeed, Mr. Parsons admitted that he was glad the final foreclosure was over. Mr. Parsons admitted in his testimony that, before January 8, 1979, he realized that the proposal for a composition of creditors was a mockery and that he told Mr. Herbert that he was through and was returning to Mobile. Thereafter, Mr. Parsons signed waivers agreeing to foreclosure of mortgages with knowledge that Mr. Orange would buy in at the mortgage sale. As a result of this foreclosure, Mr. Parsons was relieved of a personal obligation to the Bank of at least $176,000.00, his wife was relieved of a substantial personal obligation, and his Mobile business' premises were relieved of a mortgage for at least $200,000.00. There was no loan made to the Plaintiffs.

A study of the financial condition of the business in the months preceding the foreclosure in January, 1979, discloses little except to show that Mr. Parsons' recollection of the details was seriously discredited. Mr. Parsons testified that Parsons Steel did not need money in the months of August to November, 1978, but that, on December 12, 1978, when the management was transferred to Mr. Orange, who had "no knowledge of the steel business", the business fell apart before January 8, 1979. Yet, as early as January, 1978, Mr. Parsons showed a loss of $97,000.00 for the month. While this may not have been a representative month, no one denies Mr. Richard-

son's testimony that, before Mr. Herbert took over the loan, Mr. Richardson told Mr. Parsons that the Bank could not lend Parsons Steel any more money. At another time during his testimony, Mr. Parsons, himself, testified that in August, 1978, Parsons Steel had past due accounts payable but that they were not seriously in arrears - that they reached that point in September or October, 1978. When asked about the overdue account of Parsons Steel with U.S. Steel, Mr. Parsons said only that his relationship with U.S. Steel was more serious than with some other creditors. Mr. Parsons also admitted that a number of his notes to the Bank were in default. It was most obvious that the business did not simply fall apart during the month that it was managed by Mr. Orange. No loan was made during pertinent times.

THE REQUIREMENT

The strongest evidence that Mr. Herbert required a transfer of management and ownership as a condition of a loan came from Mrs. Wiggins, an accountant for Parsons. She testified that Mr. Herbert and Mr. Norris, officials of the Bank, conferred with her and Mr. Parsons in late November or early December, 1978. At that meeting, she testified that Mr. Herbert said he would need a financial statement to support further credit but that he saw no problem. She mentioned no specific loan and did not make clear whether the conversation pertained to proposed new advances or an extension of past due loans. She testified that, on or about December 12, 1978, when Mr. Herbert saw the November statement showing current liabilities in arrears, he was not pleased and said he would not make a further loan unless Mr. Orange was "taken in for management and in substantial stock". She admitted, however, that at that time the business was not current (though her prefiled affidavit shows that Parsons needed no loan in November and December, 1978, because of a satisfactory cash flow at that time), that there were substantial past due accounts payable, and that Parsons' bookkeeping system was indulging in deceit-

ful practices to inflate the book value of the business.[4] She also admitted that Mr. Herbert was not informed of this at the time she says he demanded a change of ownership. However, Mr. Parsons, himself, testified that Mr. Herbert, at that meeting on December 12, 1978, told him, "Unless you take Orange in on management, the Bank will go no further." Mr. Parsons' testimony did not coincide with Mrs. Wiggins' statement that Mr. Herbert, at the December 12, 1978, meeting, suggested that Mr. Orange have any part of the ownership of the business.

---

[4] Parsons was holding checks for payment of past due accounts so that the checkbook would show the debts paid but the bank account would reflect the sum thereof as a current asset. Parsons was listing doubtful accounts receivable (even those in litigation) as current assets.

The witnesses all agreed that a requirement of a change in management as a condition of a loan is not an unusual banking practice. It is undenied that no change of ownership occurred (so the Bank did not require a change of ownership) prior to the time the mortgage was foreclosed. It is elementary that the foreclosure of a mortgage securing a past due debt is not an unusual banking practice. It follows that the Bank did not require a change of management and ownership as a condition of a loan to either Mr. or Mrs. Parsons or to both. This Court is, therefore, of the opinion that reasonable jurors indulging all inferences most favorably for the Plaintiffs could not conclude that Mr. Parsons was required by the Bank to transfer any ownership of his business.

In addition to Mrs. Wiggins' testimony, Mr. Parsons insists that certain circumstances establish that the Bank required a change of ownership, namely, that the Bank referred Mr. Orange to Mr. Parsons as a person interested in acquiring a new business and that Mr. Orange had, as a condition of acceptance of managerial duties, required an option to buy certain stock.

Even this was categorically denied as Mr. Orange testified that he required only a reasonable method of compensation for his management of a business valued at over one million dollars, that is, either $55,000.00 a year and an option for a nominal amount and reasonable time to buy ten percent of the stock or $10,000.00 a year and an option for a nominal amount to buy a controlling interest of 55 percent of the stock.[5] Mr. Orange testifed, and Mr. Parsons did not deny, that Mr. Parsons, not Mr. Orange or the Bank, selected the offer that Mr. Orange work for $10,000.00 annual salary and 55 percent of the stock. Parsons' theory for recovery seems to rise or fall upon an implication that somehow the Bank maneuvered Mr. Parsons into the situation that he could not refuse Orange's offer to manage the business for $10,000.00 and a controlling interest. However, Mr. Parsons admitted that he made no other attempt to get anyone else to manage the business, and he offered no evidence that he had any dissatisfaction with the arrangement he made with Orange. Only after Orange became manager of the business and (finding that the financial condition and credit of the business was worse than Orange had been led to believe by Parsons) had stated that he could not continue, did Parsons find any criticism of the business proposal make by Orange. Even then, Parsons and Orange discussed - and Parsons appeared to agree - that Parsons' best interest lay in a foreclosure by the Bank whereby Orange would pay off the Bank's loan on which Mr. Parsons was surety and on a part of which Mrs. Parsons was surety. Their interest was in avoiding personal liability. There was no requirement for change of ownership.

---

[5] Mr. Orange testified of other offers whereby he would work for unusual salaries at $10,000.00 steps between $10,000.00 and $50,000.00 and have an option to buy a lesser amount of the stock as he received a larger annual salary.

THE CHANGE OF OWNERSHIP

The only effective change of ownership resulted from the foreclosure of the mortgage because Parsons wanted relief of his and his wife's suretyship liability and after Orange had pointed out Parsons' deceit in overstating the assets while selling Orange on the business. Parsons and Orange concluded that a foreclosure of the Bank's mortgage was best for both of them, and the Bank agreed. The Bank did not require Parsons to assign any ownership to Orange before the foreclosure. Parsons did not even own the stock to be transferred (his wife owned it), and it was never transferred. Even if the Bank participated in the talk of and option to change ownership, it was never changed, and the option to buy stock had lapsed because Orange had declined to exercise the option. The Bank always had the right to foreclose, and its foreclosure is not claimed to be an unusual banking practice.

At the time the Bank required (if it did) Parsons to convey ownership of the property, it was not making a loan or extending credit to Parsons but was going to extend credit to Orange's new corporation. Parsons does not have standing to sue for a practice related to a loan made to a third person.

UNUSUAL BANKING PRACTICE

Banking experts were not certain that a requirement of a change of management and ownership as a condition of a loan would necessarily be an unusual banking practice. Most had not seen both required as a condition of a loan. John McDonald, of a leading bank of Mobile, and all banking experts agreed that it would not be unusual if new management could not be obtained without new ownership. Robert Meyers, a banking consultant, had not seen both required but gave the opinion that it might be appropriate. Dr. Robert Dent, Plaintiffs' banking expert from the University of Georgia, testified that a requirement of a transfer of management as a condition of a loan is a usual banking practice but not if coupled with a requirement of a transfer of ownership. However, he said that, if a new manager could be

acquired only upon transfer of a stock option or if the business had a deficit net worth, then the situation would be changed. Mr. Louie Moore, a Montgomery banker, agreed. There was no substantial evidence from which a reasonable person could have concluded that a requirement for a change of management and ownership under the circumstances here involved was an unusual banking practice.

SUMMARY

It is significant that (1) there was a loan to Parsons Steel, but it was made by an officer of the Bank for whose conduct Plaintiffs make no complaint; (2) there was a change in management of Parsons Steel, but no loan was made in connection therewith or conditioned thereon; (3) there was a change in ownership of Parsons Steel, but it resulted from foreclosure of a mortgage which, unfortunately, is a routine banking practice and which, apparently, Mr. Parsons agreed to (see his waiver of notice, etc.); and (4) there is no evidence that the facts asserted in this cause, under the circumstances of this case, constitute an unusual banking practice.

The only evidence produced to support Plaintiffs' claim that the Defendant insisted on a change in management and ownership is the testimony of Parsons' bookkeeper, Mrs. Jean Wiggins, as to the essence of a conversation she and Mr. Parsons had with Mr. Herbert from the Defendant Bank. The Defendant insists that the isolated testimony of Mr. Parsons' bookkeeper was not sufficient to support a jury question, *Comfort Trane Air Conditioning v. Trane Co.*, supra, at 1383; *Yoder Bros. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1371 (5th Cir. 1976). The rulings in *Comfort Trane* and *Yoder Bros.*, were in reference to situations where the plaintiff's testimony was in direct conflict with documentary evidence. The *Trane* Court noted that the inference drawn from unsupported oral evidence cannot stand in the face of uncontradicted and substantial (written) evidence to the contrary. See, also, *Scott Medical Supply Co. v. Bedsole Surgical Supplies,* 488 F.2d 934,

937 (5th Cir. 1974). In the present case, the oral testimony of Mr. Parsons' bookkeeper conflicts with both the testimony of Mr. Parsons and the testimony of Mr. Herbert. Mr. Herbert's testimony is supported by the fact that documents usually associated with such transactions (loan applications and notes) are nonexistent. Those cases, therefore, are weighty authority for the Defendant.

Defendant also insists that the testimony on both the issue of an agreement to extend credit and the issue regarding a change of ownership consists of only the vaguest conversations about possibilities. The testimony of Mr. Parsons as to the loan of $250,000.00 to $600,000.00 was, indeed, vague, and no application for or note for such a loan was in evidence. Mr. Richardson testified that he talked to Mr. Parsons about a loan of $600,000.00 to consolidate pre-existing indebtedness, but this loan was to be secured by a mortgage on Mr. Parsons' house (and when Mr. Parsons declined to do this, they agreed that Parsons might refinance by payment on the debt of $100,000.00). The bookkeeper's testimony, that Mr. Herbert was not pleased with the November 30, 1978, financial statement and that Mr. Herbert told Mr. Parsons in her presence that the Bank would make no further loan unless Mr. Orange was taken in "for management and in substantial stock", was, indeed, general and vague in nature and was not even supported by Mr. Parsons as to the requirement of stock. In the light of the other evidence in this case and the failure of Mr. Parsons, himself, to testify that Mr. Herbert required the change of ownership, this Court is of the opinion that no reasonable man would conclude that Mr. Herbert ever submitted a requirement that Parsons deliver 55 percent of the stock or any other indicia of ownership to Orange.

This Court is of the opinion that, viewing the evidence in the light most favorable to the Plaintiffs, reasonable persons could not have found that the Plaintiffs proved by a preponderance of the evidence (1) that the Bank extended credit on any condition or requirement that either Plaintiff furnish some additional ser-

vice to the Bank other than those related to and usually provided in connection with a loan; or (2) than any transaction conditioned an extension of credit; or (3) that the Bank required a change of ownership of Parsons Steel; or (4) that a change of management and ownership was an unusual banking practice under the circumstances of this case.

The Defendant has also filed a motion to vacate and dismiss for absence of subject matter jurisdiction. This Court is of the opinion that, based on the pleadings, this Court has jurisdiction of the matters in controversy.

Defendant's final motion is, in the alternative, for a new trial. The burden on the moving party of such a motion being less severe than that for a judgment notwithstanding the verdict, this motion is moot.

A judgment notwithstanding the verdict will, therefore, enter in this case.

DONE this 17th day of June, 1981.

R. Varner
United States District Judge

EXHIBIT E

United States Court of Appeals,
Eleventh Circuit

June 25, 1982

Parsons Steel, Inc., et al.,
Plaintiffs-Appellants,

v.

First Alabama Bank of Montgomery, N.A.
Defendant-Appellee.

No. 81-7556

Frank M. Wilson, Beasley & Wilson, Jere L. Beasley, Montgomery, Ala., for plaintiffs-appellants.

M. R. Nachman, Jr., Steiner, Crum & Baker, Montgomery, Ala., for defendant-appellee.

Appeal from the United States District Court for the Middle District of Alabama.

Before GODBOLD, Chief Judge, MERRITT* and HENDERSON, Circuit Judges.

---

*Honorable Gilbert S. Merritt, U.S. Circuit Court Judge for the Sixth Circuit, sitting by designation.

MERRITT, Circuit Judge:

The issue in this case is whether a bank is prohibited under the 1970 Amendments to the Bank Holding Company Act, 12 U.S.C. §§ 1972-75 (1976), from conditioning additional credit on a change of corporate management and majority stock ownership. Parsons Steel, Inc. of Montgomery was a wholly owned subsidiary of the plaintiff company, Parsons Steel, Inc.,

of Mobile, owned by co-plaintiffs Melba and Jim Parsons. The subsidiary had been heavily financed on an on-going basis since 1976 by the defendant First Alabama Bank of Montgomery. By the fall of 1978, the bank had outstanding fully secured loans of one million dollars and was the subsidiary's largest creditor.

At about this time the subsidiary began experiencing financial difficulty and anticipated inability to repay its debts. Mr. Parsons and an agent of the bank discussed refinancing the subsidiary's debt. The discussion between Parsons and the bank not only focused on refinancing but also included an unsuccessful attempt to sell the subsidiary to an out-of-town corporation. After the first attempt to sell fell through, the bank contacted a local businessman, Michael Orange, with whom the bank had done business, to determine if he were interested in buying the subsidiary. Although Orange declined to buy the company, he apparently offered to take over management of the company for a fee plus a stock option.

The plaintiffs claim that the bank conditioned the grant of any additionai credit on Parson's agreement to accept Orange as the manager of the subsidiary with an option to acquire a majority interest in the subsidiary in lieu of other compensation. The bank claims that it never agreed to extend any credit and did not require that Orange be granted the controlling stock option. The jury found that the bank did condition the extension of credit on the appointment of Orange as manager and on granting the option.

The District Court, although denying the defendant's motions for summary judgment and a directed verdict, heard all the evidence and ultimately granted the bank's motion for judgment notwithstanding verdict. The plaintiffs contend that in granting the judgment n.o.v., the District Court usurped the function of the jury and substituted its judgment of the credibility of the witness for that of the jury.

Taking the facts in the light most favorable to plaintiffs, we find, as a matter of law, that a bank's requirement that financial

control of an enterprise be placed in new hands when necessary to protect its investment before extending further credit, does not constitute a violation of the statute, 12 U.S.C. § 1972, absent evidence of a "tying" arrangement. We, therefore, affirm the judgment of the District Court.

Section 1972 of the Act provides in relevant part that "[a] bank shall not in any manner extend credit . . . on the condition . . . that the customer provide some additional credit, property, or service to such bank, *other than those related to and usually provided in connection with a loan, . . .*" 12 U.S.C. § 1972(1) (1976) (emphasis added). The appellants' arguments rest primarily on the single premise that a jury's finding that it is "unusual" for a bank to require a change in management and ownership as a condition to extending additional credit to an already heavily indebted enterprise in fear of default is sufficient to establish liability under the Act.

Although the language of the Act, when read in isolation, appears broad enough to encompass such a rule, the legislative history of the statute leaves no doubt that its intent is more narrow. The original focus of the Bank Holding Company Act was the regulation of the power of bank holding companies so as to prevent a small number of powerful banks from dominating commerce and to ensure a separation of economic power between banking and commerce. See Sen.Rep.No.91-1084, 91st Cong., 2nd Sess., reprinted in [1970] U.S. Code Cong. & Ad.News 5519, 5520; 116 Cong.Rec. 32127 (1970). With the 1970 Antitying Amendment, however, Congress intended to reach anticompetitive practices of even smaller banks, which notwithstanding their comparative size, were able to exert economic power over businesses because of their control over credit. *Id.* at 5535. In regulating potential misuse of such economic power, however, Congress was concerned that the federal regulation not be too expansive. First, Congress did not intend to "interfere with the conduct of appropriate traditional banking practices," *id,* and did not intend to prohibit attempts by banks to protect their investments where no anticompetitive

practices were involved. A *per se* rule prohibiting banks from devising particular methods for protecting themselves against default in various situations could have the undesirable effect of discouraging banks from granting extensions of credit, and thus precipitate foreclosure or bankruptcy. There is no support for such a rule in the legislative history. Indeed, an earlier proposed version of the antitying provision which would have potentially subjected virtually all conditions placed by banks on extensions of credit requiring credit customers to purchase additional services from the bank to review by the Federal Reserve Board, was amended to incorporate the narrower language of the statute which explicitly permits banks to take certain actions to protect their investments while prohibiting anticompetitive practices. *See* Remarks of Senator Bennett, 116 Cong.Rec. 32125 (1970). Second, it appears that Congress was concerned that the proposed federal banking regulation not intrude upon recognized state authority over the banking process. In proposing the version of § 1972 that was ultimately enacted Senator Bennett noted that "[t]o provide federal bank regulatory restrictions on state banking practices without reference to antitrust considerations would be a reversal of a long-standing policy under which State law regulates State banking practices . . ." 116 Cong.Rec. at 32130-31. It appears, therefore, that the purpose and effect of § 1972 is to apply the general principles of the Sherman Antitrust Act prohibiting anticompetitive tying arrangements specifically to the field of commercial banking, without requiring plaintiffs to establish the economic power of a bank and specific anticompetitive effects of tying arrangements:

> [T]ying arrangements involving a bank are made unlawful by this section without any showing of specific adverse effects on competition or other restraints of trade and without any showing of some degree of bank dominance or control over the tying product or service. Moreover, as individual tying arrangements may involve only relatively small amounts, the prohibitions of this section are applicable regardless of the amount of commerce involved.

Sen.Rep.No.91-1084, 91st Cong., 2nd Sess. [1970], U.S.Code Cong. & Admin.News 5519, 5558 (Supplementary Views of Edward W. Brooke).

Given the specific purposes for which the statute was enacted, it is not sufficient in order to establish a violation of the Act to show simply that a particular method of protecting against default is not commonly used. Unless the "unusual" banking practice is shown to be an anticompetitive tying arrangement which benefits the bank, it does not fall within the scope of the Act's prohibitions.

Our decision here is consistent with the former Fifth Circuit's interpretation of § 1972 in *Swerdloff v. Miami National Bank,* 584 F.2d 54 (5th Cir. 1978). In *Swerdloff* the bank allegedly required the owners of an indebted corporation to sell 51% of the company stock to a competitor, also a customer of the Bank. The issue there was whether the fact that a bank required a sale of a business to a third party where no benefit to the bank was alleged, constituted a 'tying arrangement' under the Act. The Court held that where a bank is alleged to have imposed a requirement that the business be sold as a condition of granting further credit, benefit to the bank may be assumed for the purposes of a motion on the pleadings. In the instant case, the District Court, consistent with *Swerdloff,* refused to dismiss the case on the pleadings and in fact denied the Bank's motion for summary judgment and directed verdict. The District Court allowed the plaintiffs the opportunity to establish the existence of a prohibited tying arrangement. The plaintiffs were able to establish only that the requirement allegedly imposed upon them was an unusual banking practice. But to establish a violation of § 1972, the "unusual banking practice" must be shown to be a tying arrangement. The plaintiffs must prove the existence of "anti-competitive practices which require bank customers to accept . . . some other service or product . . . in order to obtain the bank product or service they desire." [1970] U.S.Code Cong. & Ad.News at 5535.

The plaintiffs have here failed to establish facts from which the existence of a tying arrangement benefitting the bank could reasonably be inferred. The bank did not tie the loan to any other bank product, service or benefit, and thus there is no "tied" product or service. The subsidiary was in financial difficulty and the bank was simply reluctant to grant additional credit. Parsons was in the market for a purchaser of the subsidiary he controlled. The fact that Mr. Orange had been a customer of the bank and that his name was suggested by the bank does not establish a "tie-in." There is no evidence that the bank would benefit in any way other than by getting additional protection for its investment. That is not a tying arrangement. The allegation that the bank wanted to induce Mr. Orange to do additional business by offering him a favorable deal has no factual support. The District Court's grant of a judgment notwithstanding verdict was thus justified.

Other Circuits that have interpreted the amended Act are in accord with the view that § 1972 is intended to prohibit anticompetitive tying arrangements, and that other uses of a bank's economic power to protect its investments are not affected by the Act. *Tose v. First Pennsylvania Bank,* 648 F.2d 879 (3rd Cir.), *cert. denied,* ____ U.S. ____. 102 S.Ct. 390, 70 L.Ed.2d 208 (1981) (bank's imposition of financial controls in order to protect its investment, even when a change in ownership is necessary, not a violation of the Act); *B.C. Recreational Industries v. First Nat'l Bank of Boston,* 639 F.2d 828 (1st Cir. 1981) (requirement that borrower in danger of default hire a specified general manager not a tying arrangement prohibited by the Act); *see also, McCoy v. Franklin Savings Ass'n,* 636 F.2d 172 (7th Cir. 1980); *Duryea v. Third Northwestern Nat'l Bank,* 606 F.2d 823 (8th Cir. 1979); *Costner v. Blount Nat'l Bank,* 578 F.2d 1192 (6th Cir. 1978); *Clark v. United Bank of Denver,* 480 F.2d 235 (10th Cir.), *cert. denied,* 414 U.S. 1004, 94 S.Ct. 360, 38 L.Ed.2d 240 (1973).

The subsidiary was indebted to the bank by over one million dollars, and was faced in the fall of 1978 with the prospect of default in the near future if existing debts were not refinanced. The bank was unwilling to extend further credit to Parsons. Under these circumstances, assuming that the bank conditioned the grant of additional credit upon a change in management and ownership, there is no violation of § 1972. Accordingly, the judgment of the District Court is AFFIRMED.

EXHIBIT F

In the Circuit Court of Montgomery County, Alabama

Civil Action No. CV-79-179-G

[Caption Omitted]

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OF DEFENDANT FIRST ALABAMA BANK OF MONTGOMERY, N.A.*

Defendant First Alabama Bank of Montgomery, N.A. ("Bank"), pursuant to Rule 50(a), ARCP, moved for a directed verdict on February 3, 1983 at the close of plaintiffs' evidence; and on February 7, 1983 this defendant again moved for a directed verdict at the close of all the evidence. This Court denied both motions. Defendant Bank now moves the Court, pursuant to Rule 50(b), ARCP, to set aside the verdict* entered in the above entitled action on February 9, 1983, and to enter judgment in accordance with Bank's aforesaid motion for directed verdict. Bank's said motion for directed verdict should have been granted; and defendant's motion for judgment notwithstanding the verdict should be granted because:

1. The said verdict was manifestly unjust and it is essential in the interest of justice, to avoid a gross miscarriage of justice and to avoid an unconstitutional deprivation of Bank's property without due process of law in violation of the Fourteenth Amendment of the United States Constitution that this motion of defendant be granted.

2. In the light of all the evidence, and with all reasonable inferences considered most favorably to plaintiffs, the facts and inferences point so strongly and overwhelmingly in favor of Bank that reasonable men and women could not arrive at any verdict other than one for defendant.

---

*This motion is addressed to the *four* verdicts returned on February 9, 1983. Each ground is addressed to each verdict unless otherwise indicated.

3. The facts and inferences point so strongly and overwhelmingly in favor of defendant, that the Court must conclude that no reasonable men or women could arrive at a verdict for plaintiffs in this action.

4. There is no conflict in material evidence sufficient in law to create a jury question. Moreover, unsupported, self-serving testimony is not, and cannot be, sufficient evidence to create a jury question in this case.

5. There is no evidence of sufficient probative value or substance to support the verdict for plaintiffs in this action.

6. There is insufficient evidence of probative value or substance to support the verdict for plaintiffs in this action.

7. The verdict for plaintiffs is unsupported by evidence of any probative value or substance.

8. The settlement of January 28, 1983, entered into by and among plaintiffs and Orange and OSI, Inc. bars in its entirety plaintiffs' action against this defendant.

9. This jury verdict, if allowed to stand would deprive Bank of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States and of the Alabama Constitution of 1901. For the verdict in this case is so gross and extravagant as to exceed the bounds of reason, to result in sheer oppression and punishment, and to result in a gross miscarriage of justice which cannot be tolerated by the law and the constitutional guaranties of due process of law.

10. Defendant's right not to be deprived of property without due process of law guaranteed by the Constitution of Alabama of 1901 and the Fourteenth Amendment of the Constitution of the United States has been denied and violated in that the verdict is punitive in nature and without any probative or substantial evidence of defendant's liability.

11. Defendant's punishment — the amount of damages awarded — so greatly exceeds the alleged wrong that defendant's right not to be deprived of property without due process of law guaranteed by the Constitution of Alabama of 1901 and the Fourteenth Amendment of the Constitution of the United States has been denied and violated.

12. The action brought in the complaint, as amended, of plaintiff Parsons Steel Industries, Inc. is barred in its entirety by the doctrine of *res judicata*. This doctrine applies because of the prior adjudication on the merits in Parsons Steel, Inc., et al. v. First Alabama Bank of Montgomery, N.A., in the United States District Court for the Middle District of Alabama, affirmed 679 F.2d 242 (11th Cir. 1982). (Copies of that judgment and appellate opinion are attached and made a part of this motion.)

13. The action brought in the complaint, as amended, of plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba Parsons is barred in its entirety by the doctrine of *res judicata*. This doctrine applies because of the prior adjudication on the merits in Parsons Steel, Inc., et al. v. First Alabama Bank of Montgomery, N.A. in the United States District Court for the Middle District of Alabama, affirmed 679 F.2d 242 (11th Cir. 1982).

14. The action brought in the complaint, as amended, of plaintiff Parsons Steel Industries, Inc. is barred in its entirety by the doctrine of collateral estoppel. This doctrine applies because of the prior adjudication on the merits in Parsons Steel, Inc., et al. v. First Alabama Bank of Montgomery, N.A., in the United States District Court for the Middle District of Alabama, affirmed 679 F.2d 242 (11th Cir. 1982).

15. The action brought in the complaint, as amended, of plaintiffs, Parsons Steel, Inc., Jim D. Parsons and Melba Parsons is barred in its entirety by the doctrine of collateral estoppel. This doctrine applies because of the prior adjudication on the merits in Parsons Steel, Inc., et al. v. First Alabama Bank of Montgomery, N.A., in the United States District Court for the Middle District of Alabama, affirmed 679 F.2d 242 (11th Cir. 1982).

16. The evidence requires a finding that this action in its entirety is barred by the doctrine of consent because the plaintiffs consented to the acts, omissions or transactions about which they now complain.

17. The evidence requires a finding that this action in its entirety is barred by the doctrine of estoppel in that plaintiff Jim D. Parsons, for himself and for the other plaintiffs, consented to and willingly participated in the acts, omissions or transactions about which plaintiffs now complain.

18. The evidence requires a finding that this action, in its entirety, is barred by the doctrine of waiver because plaintiff Jim D. Parsons, for himself and for the other plaintiffs, has waived any right or standing to complain about the acts, omissions or transactions alleged in the complaints, as amended.

19. The evidence requires a finding that this action as to plaintiff Parsons Steel Industries, Inc. may not be maintained because that plaintiff has admitted the falsity of all material and relevant allegations of its complaint and has admitted that it is not entitled to any relief. These admissions were made in Parsons Steel Industries, Inc. v. Parsons Steel, Inc., Case No. 79-173-N in the United States Bankruptcy Court for the Middle District of Alabama.

20. Plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons have no standing to bring this action and are improper parties to it.

21. The evidence requires a finding that plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons have no standing to bring this action and are improper parties to it.

22. The evidence requires a finding that plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons have not suffered any damages for which they are entitled to recover under their complaint, as amended, and that, as a matter of law, these plaintiffs have no standing to bring this action and are improper parties to it.

23. The evidence is insufficient to support a finding that plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons suffered any damages as a result of the matters alleged in their complaint, as amended.

24. There is insufficient evidence to support the damages awarded in this case which awards are so gross, excessive and oppressive as to shock the conscience of the Court and are surely the result of passion, prejudice or other improper motives.

25. The evidence is insufficient to support a finding that any special or fiduciary relationship existed between any plaintiff and this defendant.

26. The evidence requires a finding that no special fiduciary relationship existed between any plaintiff and this defendant.

27. The evidence is insufficient to support a finding that plaintiff Parsons Steel Industries, Inc. was a solvent business at any time material or relevant to this action or to plaintiffs' complaints, as amended.

28. The evidence requires a finding that plaintiff Parsons Steel Industries, Inc. was not solvent at the times material to plaintiffs' complaint, as amended.

29. Plaintiff Parsons Steel Industries, Inc. has, in a prior action, admitted that it was insolvent at all times material to plaintiffs' complaint, as amended.

30. The evidence is insufficient to support a finding that financial information concerning plaintiff Parsons Steel Industries, Inc. in the December 21, 1978 letter to creditors was false or misleading.

31. The evidence requires a finding that the financial information concerning Parsons Steel Industries, Inc. contained in the December 21, 1978 letter to creditors was not fraudulent, false or misleading.

32. The evidence requires a finding that this defendant supplied none of the financial information concerning Parsons Steel Industries, Inc. contained in the December 21, 1978 letter to creditors which plaintiffs allege to be false, fraudulent or misleading.

33. The evidence is insufficient to support a finding that the proposed composition of creditors was done at the request or direction of this defendant.

34. The evidence requires a finding that the proposed composition of creditors was not done at the request or direction of this defendant.

35. The evidence requires a finding as a matter of law that the sale of the collateral on January 17, 1979 was commercially reasonable. *First Alabama Bank of Montgomery, N.A. v. B&E Steel Services, Inc.*

36. The evidence is insufficient to create an issue of fact as to whether the sale of the collateral on January 17, 1979 was commercially reasonable. *First Alabama Bank of Montgomery, N.A. v. B&E Steel Services, Inc.*

37. The evidence is insufficient to support a finding that the collateral was sold for an amount substantially less than its fair market value, or that there was a lack of notice. As a matter of law, for the sale to have been commercially unreasonable, both circumstances must have taken place and must have combined to proximately cause damage to any plaintiff claiming damages for alleged commercial unreasonableness. *First Alabama Bank of Montgomery, N.A. v. B&E Steel Services, Inc.*

38. The evidence is insufficient to support a finding that the collateral was sold at a substantially lower price than the collateral would have sold for at a commercially reasonable sale.

39. The evidence requires a finding as a matter of law that the collateral was not sold at substantially lower price than said collateral should have brought at a commercially reasonable sale.

40. The evidence is insufficient to support a finding that the sale of the collateral was not commercially reasonable.

41. The evidence requires a finding that the sale of the collateral was commercially reasonable.

42. The evidence requires a finding that plaintiffs waived notice of disposition of the collateral.

43. The evidence requires a finding that as a matter of law, plaintiffs consented to the time, manner and price of the sale of collateral about which they now complain in this action.

44. The evidence is insufficient to support a finding of any damages proximately caused by the alleged insufficiency of the notice of disposition of the collateral.

45. There is no evidence sufficient to support the damages awarded in this case which awards are so gross, excessive and oppressive as to shock the conscience of the Court and of a civilized legal system, and are surely the result of passion, prejudice or other improper motives.

46. The evidence is insufficient to warrant a finding of fraud. The alleged fraudulent representation was a promise of further financing. Since this representation involves a promise to perform or abstain from some act in the future, for there to be fraud, there must be evidence that at the time the promises of future action or abstention were made, the promisor had no intention of carrying out the promises, but rather had a present intent ot deceive. The great weight and preponderance of the evidence does not support such a finding; and there is no evidence of sufficient probative value or substance to support such a finding.

47. The evidence is insufficient to support a finding that any promise of further financing was made. Jim D. Parsons himself testified that Herbert said that further financing might not be necessary. June Neely Williams testified that Herbert said that

further loans would be made if Michael Orange thought they were necessary. Michael Orange testified that upon discovering how bad the financial condition of the company actually was, further loans were out of the question.

48. The evidence is insufficient to warrant a finding that defendant, at the time a promise was made, if it was made, had no intention of carrying out the promise, but rather had a present intent to deceive. Indeed, there is no such evidence. This intent must be substantiated by the evidence; it was not so substantiated; and the fraud claim of plaintiffs was erroneously submitted to the jury. Mere failure to perform a promise is not of itself evidence of intent not to perform at the time the promise was made. This intent to defraud must be clearly and satisfactorily proved by a preponderance of the evidence, and a jury has no untrammeled discretion to speculate upon the existence of fraudulent intent.

49. The evidence is insufficient to support a finding that this defendant led plaintiffs to believe that all loans would be renewed.

50. The evidence is insufficient to support a finding of any illegal conspiracy between this defendant and other defendants, or among defendants and Orange and OSI.

51. The evidence is insufficient to support a finding of any fraud by this defendant.

52. The evidence is insufficient to support a finding that this defendant was dealing with any plaintiff in any manner other than at arms length.

53. The evidence is insufficient to support a finding that defendant Edward Herbert on or about December 12, 1978, or at any other time, promised that Bank would lend additional funds to any plaintiff.

54. The evidence is insufficient to support a finding that any such promise of additional funds referred to in paragraph 53, if made, was made with no intention of performance and with actual intent to deceive.

55. There is a total absence of evidence of coercion or duress; those issues are not adequately raised by the pleadings or contentions; and the Court erred in submitting those issues to the jury.

56. The evidence is insufficient to support a finding of coercion or duress.

57. The evidence is insufficient to support a finding that this defendant forced any plaintiff to convey any real estate owned by Parsons Steel, Inc.

58. The evidence is insufficient to support a finding that this defendant converted any property of any plaintiff to this defendant's own use.

59. The evidence is insufficient to support a finding that this defendant conspired to convert plaintiff's property to defendant Herbert's or defendant Bank's own use.

60. The evidence is insufficient to support a finding that plaintiff has been damaged as a proximate result of any acts or omissions of this defendant.

61. Punitive damages are not recoverable as a matter of law for plaintiffs' claim concerning the commercial reasonableness of the sale of the collateral.

62. The evidence is insufficient to warrant submission to the jury of the issue of punitive damages.

63. The evidence requires a finding as a matter of law that the issue of punitive damages cannot be submitted to the jury, and that no plaintiff is entitled to punitive damages from this defendant.

64. The evidence is insufficient to warrant a finding that any plaintiff relied to their detriment on any representations allegedly made by this defendant.

65. The evidence requires a finding that this defendant is guilty of none of the wrongs asserted by any plaintiff in their complaints and contentions; and requires, moreover, a verdict in favor of this defendant on all issues involved in this action.

WHEREFORE, the above specified grounds, separately and severally, entitled defendant to a directed verdict — and now entitle defendant to a judgment N.O.V..

STEINER, CRUM & BAKER

BY M. R. Nachman, Jr.

BY James A. Byram, Jr.

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

ANSWER OF A. POPE GORDON

COMES NOW A. Pope Gordon, Trustee in Bankruptcy for the Estate of Parsons Steel Industries, Inc., Defendant in the above-styled action, and answers the Complaint of Plaintiff First Alabama Bank of Montgomery, N.A. ("Bank") and Edward Herbert ("Herbert") as follows:

1. Trustee admits the allegations of Paragraphs 1 and 2 of Plaintiffs' Complaint.

2. Trustee denies the allegation contained in Paragraph 3 of Plaintiffs' Complaint in that it fails to list all of the Defendants and Plaintiffs in the original action as filed, Parsons Steel Industries, Inc., et al. vs. First Alabama Bank of Montgomery, N.A., et al., Civil Action No. CV-79-179-Ta. In the original Complaint, as adopted by Trustee, the additional parties of Michael Orange and OSI, Inc. were named defendants. Said Michael Orange and OSI, Inc. were dismissed pursuant to a pro tanto settlement and release entered immediately prior to the trial in State court.

3. Trustee admits the allegations in Paragraph 4 and states that Trustee was not a party to said action.

4. Trustee denies that this Court has jurisdiction of this action with regard to Trustee under 28 U.S.C. §2283 or under the cases cited by Plaintiffs. In support of this contention, Trustee urges that pendant party jurisdiction over Trustee, Michael Orange, and OSI, Inc. could not have been asserted in the Federal action. *Aldinger v. Howard,* 427 U.S. 1, 49 L.Ed.2d 276, 96 S.Ct. 2413 (1975).

5. As to the allegations contained in Paragraph 6 of Plaintiffs' Complaint, Trustee denies that "This Complaint generally avers fraud in connection with an alleged requirement by Bank that Parsons Montgomery change its management and ownership as a condition for further financing and alleged violations of Alabama law in connection with subsequent repossession and sale of the property of Parsons Montgomery." Although the February 15, 1979 Complaint does allege fraud, it does so with specificity regarding acts of the Bank and its officers. Furthermore, the Complaint as Amended alleges a number of separate causes of action. Specifically, Trustee alleged in his Amended Complaint that the Bank had violated provisions of the Uniform Commercial Code in the foreclosure and sale of repossessed property.

6. As to Paragraph 7 of Plaintiffs' Complaint, Trustee admits the first sentence of Paragraph 7. As to the second sentence of Paragraph 7, Trustee neither admits nor denies the general and broad allegations of the second sentence, but states that it is within the knowledge and understanding of Trustee that the Complaint filed on March 30, 1979 by "Parsons - Mobile", "Jim D. Parsons" and "Melba L. Parsons" was bottomed on allegations of violation of the Federal Bank Holding Company Act.

7. Trustee denies the allegations of Paragraph 8 that the "Complaints in both State action and Federal action are virtually identical." Trustee generally denies the broadly stated argument in the remainder of Paragraph 8.

8. Trustee admits those allegations in Paragraph 9 of Plaintiffs' Complaint that this Honorable Court bifurcated liability from other issues in the "Federal action". Trustee admits that this Honorable Court granted "Bank's Motion for JNOV and set aside the jury verdict and rendered an Order and Judgment of June 17, 1981. Trustee admits that the Eleventh Circuit affirmed this Honorable Court's judgment on June 25, 1982 at 679 F.2d 242.

9. As to Paragraph 10 of Plaintiffs' Complaint, Trustee admits that "Bank" and "Herbert" unsuccessfully raised the grounds of *res judicata* and collateral estoppel as a bar to further proceedings in the State action. Trustee states further that "Bank" and "Herbert" have raised those same grounds in their motions for new trial or JNOV with the State court.

10. As to the allegations of Paragraph 11, Trustee generally denies the argument of counsel asserted therein.

WHEREFORE, Trustee respectfully submits that Plaintiffs are not entitled to preliminary or permanent mandatory injunctive relief against any Defendants, and specifically as not against Defendant A. Pope Gordon, and as additional reasons therefor, cite this Honorable Court to the arguments contained in the brief of Trustee attached hereto.

Respectfully submitted,

JAMES JERRY WOOD

THOMAS R. DEBRAY

Attorneys for Trustee

ANSWER OF DEFENDANTS PARSONS STEEL, INC., JIM D. PARSONS AND MELBA L. PARSONS

First Defense

1. This Court lacks jurisdiction of Plaintiffs' complaint.

Second Defense

1. This Court lacks jurisdiction of these Defendants.

Third Defense

1. This Court lacks jurisdiction to grant Plaintiffs the relief they request.

Fourth Defense

1. Plaintiffs complaint fails to state a claim upon which relief can be granted.

Fifth Defense

1. These Defendants admit paragraphs one, two, three, and four.

2. These Defendants deny paragraphs five, eight, and eleven.

3. These Defendants admit the allegations contained in the first sentence of paragraph six buy deny all other allegations in that paragraph and demand strict proof thereof.

4. These Defendants admit the allegations in the first and last paragraphs and paragraph nine but deny the allegation in the second paragraph of paragraph nine and demand strict proof thereof.

Sixth Defense

1. Plaintiffs have waived their right, if any, to the relief sought in their complaint.

Seventh Defense

1. Plaintiffs' complaint is barred by laches.

Eighth Defense

1. Plaintiffs lack the "clean hand" necessary to entitle them to the relief sought in their complaint.

Ninth Defense

1. Plaintiffs are estopped from seeking the relief sought in their complaint due to their continued litigation of the state action.

BEASLEY AND WILSON

BY: FRANK M. WILSON

Attorneys for Defendants
Parsons Steel, Inc., Jim D. Parsons
and Melba L. Parsons

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action at Law
Case No. 83-V-181-N

First Alabama Bank of Montgomery, N.A.,
and Edward Herbert,

Plaintiffs,

vs.

Parsons Steel, Incorporated; Jim D. Parsons;
Melba L. Parsons; and Parsons Steel Industries, Inc.;
and A. Pope Gordon, as Trustee in Bankruptcy for
Parsons Steel Industries, Incorporated,

Defendants.

* * *

**HEARING ON REQUEST FOR
PRELIMINARY INJUNCTION**

* * *

BEFORE the Honorable Robert E. Varner, District Judge, at the Courthouse, Montgomery, Alabama, on March 17, 1983.

* * *

Appearances

For the Plaintiffs:	Steiner, Crum & Baker Attorneys at Law Montgomery, Alabama
	BY: M.R. Nachman, Jr., Esquire
For the Defendant Parsons:	Beasley & Wilson Attorneys at Law Montgomery, Alabama

BY: Jere Beasley, Esquire
and Frank Wilson, Esquire

For the Defendant Trustee: Wood, Minor & Parnell
Attorneys at Law
Montgomery, Alabama

BY: J. Jerry Wood, Esquire
and Thomas R. DeBray, Esquire

* * *

Official Reporter
Lewis F. Wimberley

[2] THE COURT: Calling the case of the First Alabama Bank versus Parsons Steel and others.

This case is set for a hearing on a Petition for a Preliminary Injunction. Do you really need to take any evidence in the case?

MR. NACHMAN: Your Honor, we have a few documents which we would like to introduce, but no oral testimony.

MR. WILSON: Your Honor, for the Defendant Parsons, we have some documents.

MR. WOOD: And on behalf of the Trustee, we are in the same position; we have some documents.

THE COURT: All right.

MR. NACHMAN: Your Honor, in view of that circumstance, we wonder whether the Court could, under Rule 65-2, whether the Court could take the whole matter under consideration for preliminary and permanent?

THE COURT: It seems to me it would not be inappropriate.

What position do you take about that?

MR. WILSON: I can't see that there would be any distinction between the two, and we would think it would be appropriate.

THE COURT: Mr. Wood?

MR. WOOD: No objection to your doing that, Your Honor.

[3] THE COURT: Seems to me it would save everybody a lot of time and trouble.

I think that it may be that since all of you have filed briefs prior to the time of the presentation of this matter, that it is possible some of you may want to file briefs afterward, if we don't hash it out. And we will talk about that at the end of this hearing after we have heard the arguments.

All right. Offer your evidence, please, sir.

MR. NACHMAN: Your Honor, we would like to offer all of the exhibits attached to the Complaint, which are Exhibits A through E respectively. And either as Exhibit 1 or F, as the Clerk might prefer —

THE COURT: I am sorry. I didn't understand you. Move back there and use the speaker, please, sir.

MR. NACHMAN: We have numbered the exhibits to the Complaint as A through E, which I have just introduced in evidence. Our next exhibit we can number either F or 1, as the Clerk would prefer.

THE COURT: Well, it may be that it would be well to number it 1 to distinguish it from those that are already attached to the file.

MR. NACHMAN: All right, sir. Exhibit 1 is the Civil Case Action Summary from the State Court proceeding.

Do you have a copy of that?

[4] MR. WILSON: Yes, sir.

MR. WOOD: Yes, sir.

MR. NACHMAN: Our Exhibit 2 is a witness list from the Federal action which is taken from the transcript of the pro-

ceedings in this court which were filed with the Eleventh Circuit Court of Appeals in connection with the appeal.

Do you all have a copy of that?

MR. WILSON: Yes.

MR. NACHMAN: Do you need a copy?

MR. WOOD: Yes, sir.

MR. NACHMAN: Our next Exhibit 3, Your Honor, which we offer, is a witness list of those who testified in the State action for the Plaintiffs and for the Defendants, which I prepared and have shown to counsel. It is certainly subject to correction if my recollections and notes were inaccurate. This is Exhibit 3.

THE COURT: All right.

MR. NACHMAN: Exhibit 4, Your Honor, which we offer, is a witness list filed in the State Court proceedings by Pope Gordon, the trustee in bankruptcy, on August 16, 1982.

Our next Exhibit 5, Your Honor, is the witness list filed in the State action by the other Plaintiffs, Parsons Steel, Inc., Jim Parsons and Melba Parsons.

[4] THE COURT: As I understand it, your Exhibits 2 and 3 are lists of witnesses as you recall them who testified?

MR. NACHMAN: Yes, sir.

THE COURT: The others are lists as filed by the parties?

MR. NACHMAN: In advance of trial as the witnesses they expected to call, yes, sir.

THE COURT: All right.

MR. NACHMAN: And Exhibit 2, Your Honor, is taken from the transcript of the Federal proceedings. Those are the witnesses who did indeed actually testify.

THE COURT: You are simply not sure about Exhibit 3 being complete?

MR. NACHMAN: Well, I am sure, but I realize that counsel's recollection may be different from mine —

THE COURT: I have seen lawyers who were sure before.

But, go ahead. We will give everybody an opportunity to correct those if you . . .

MR. NACHMAN: Exhibit 6, Your Honor, is the witness list filed in advance of the Federal trial by the Plaintiffs in that action.

Exhibit 7 consists of a copy of pages 24 through 35 of the transcript of the Federal proceeding which consists of opening argument made by Mr. Beasley and counsel [5] for the Plaintiffs in the Federal action

Exhibit 8 consists of pages 956 through 969 of the —

THE COURT: 956?

MR. NACHMAN: Through 969 of the transcript of the Federal action. And that consists of a portion of the closing argument made by Mr. Beasley on behalf of the Plaintiffs in that action.

Exhibit 9, Your Honor, is a copy of the Summons and Complaint in another State action brought by Jim Parsons, Melba Parsons and Parsons Steel against First Alabama Bankshares, First Alabama Bank of Montgomery, and Merchants National Bank. It was served on March 9, 1983 and seeks one hundred nineteen million dollars against First Alabama Bank of Montgomery and the other Defendants.

THE COURT: Of course, this is not the suit in which they recovered?

MR. NACHMAN: No, sir.

THE COURT: It is a suit against whom?

MR. NACHMAN: It is a suit against First Alabama Bank of Montgomery, First Alabama Bankshares — the holding company — and Merchants National Bank in Mobile. It was served on us on March the 9th, two days after we brought this action in this court, Your Honor. And it [6] alleges, insofar as this bank is concerned, that this bank tried to coerce a settlement of the state action we are concerned with, and asks damages in the amount of one hundred nineteen million dollars against First Alabama Bank of Montgomery, along with the other two Defendants.

It comes within the scope of our prayer for injunctive relief as to other related actions. And I believe it is sub-E of our prayer for relief.

MR. WILSON: For the Record, we would object to that exhibit in that I certainly don't believe it could possibly be arising out of . . . since the matters complained of in the most recent lawsuit all ocurred in the years 1982 and 1983, we certainly don't believe it could possibly, by any stretch of the imagination, be barred by a case tried in this court in May of 1981. Secondly, it was not my understanding until we got here this morning that they were seeking to enjoin that litigation.

So, for the Record, we would object to the admission of that document.

THE COURT: Well, are you seeking to enjoin the action filed March 9th?

MR. NACHMAN: Yes, sir.

THE COURT: It wasn't filed until after this suit was filed?

[7] MR. NACHMAN: Yes, sir. It was filed, according to the Clerk's Office, on the 3rd of March. It was not served on us until the 9th of March.

THE COURT: Well, you didn't mention it in your Complaint, did you?

MR. NACHMAN: No, sir, except that it is included in the prayer for relief as to the institution and prosecution of any other or different actions in the State or Federal court which seeks to re-litigate therein matters which were or could have been litigated in the Federal action.

If the Court feels that we should amend, we would ask leave to amend to specify this as an event which occurred after the drafting and filing of this.

THE COURT: I am inclined to think that they have a right to put it in if it is not in, Mr. Wilson. Obviously you would have a right to amend your situation. I don't know exactly what you may want to amend so as to fully consider that aspect of it.

I don't know anything about that suit, obviously. Whether or not it would be involved in the same series of litigations, I have no opinion about it.

MR. WOOD: Judge Varner, for the Record, the Trustee A. Pope Gordon is not a part of and has no interest in this particular lawsuit or those pleadings.

[8] MR. NACHMAN: That is correct, Your Honor. We do not offer it as to the Defendant Trustee.

THE COURT: All right; it is excluded as to the Trustee.

Anything else?

MR. NACHMAN: That is all for the Plaintiff, Your Honor.

THE COURT: All right. Do you have any evidence you want to offer?

MR. WILSON: Yes, sir.

Your Honor, we have a number of pleadings from the State litigation that we would offer, as well.

I would first like to ask the Court if it would be appropriate for this Court to take judicial notice of the matters in the Federal litigation which, of course, was tried before this Court?

THE COURT: It is appropriate for the Court to take judicial knowledge of it. But I, like Mr. Nachman, I don't completely trust my recollection. I want each of you to feel free to contribute to my recollection of what is in the Record in the Federal case. I know you have all reviewed it since I have, and I don't pretend to remember everything.

MR. WILSON: I had to go back and review it before I had much of a recollection of it, Judge.

[9] I will, then, ask the Court, when I get through with these exhibits in the state action, that I might refer to some of the exhibits . . . some of the pleadings in the federal action without actually submitting them as a numbered exhibit this morning.

MR. NACHMAN: Your Honor, would it help —

THE COURT: Well, Mr. Nachman wants to be heard on the matter.

MR. NACHMAN: I just wanted to say that I would stipulate, Your Honor, that any party can ask the Court to take judicial notice of any of the materials on file in the federal action, if that would help.

THE COURT: Thank you.

MR. WILSON: I will just refer to us as the Parsons Defendants, as separated from the Trustee.

Our first exhibit would be the Defendants — in the state court action — renewed motion to dismiss, which was filed on the 24th of October, 1979. Number 1 would be the bank's motion to dismiss.

Parsons Defendants' Exhibit No. 2 —

THE COURT: Wait a minute. I am a little bit confused.

MR. WILSON: All right, sir.

THE COURT: You said Defendant Parsons' Exhibit 1 was what, now?

[10] MR. WILSON: It is the bank's motion to dismiss, filed October 24, 1979, in the state action.

THE COURT: All right.

MR. WILSON: Number 2 would be renewed motion to dismiss in the state action by Defendant Herbert, filed the same day, October 24, 1979.

Parsons Defendant Exhibit 3 would be the order of the Circuit Court in the state action dated December 12, 1979, which ordered that the Trustee in Bankruptcy be made a party to that action, and granted the motions that are referred to in Exhibits 1 and 2, to that extent.

THE COURT: Granted the motions to dismiss?

MR. WILSON: As to . . . In lieu of granting them . . . The basis for the motion to dismiss was that they had no standing, they were improper parties. And he ordered that this proper party be made a party to the state action on the request of the Defendants.

THE COURT: All right.

MR. WILSON: Exhibit 4 would be the order of the Circuit Court dated March 17, 1982, denying Defendant bank and Herbert's summary judgment motion which was premised on res judicata.

Exhibit 5 would the the Defendants' motion to strike, or in the alternative, answer the second amended Complaint in the state action, which was filed on June 22nd, **[11]** 1982.

Number 6 would be a notice of intent to serve subpoena filed in the state action by Defendants on August 6, 1982.

Number 7 would be a request for production of documents filed by the Defendants in the state action on July 22nd, *1983*.

Number 8 would be an order of the Circuit Court dated January 6, 1983, on a renewed motion for summary judgment by the Defendants based on the res judicata defense.

Exhibit 9 is the contentions of the Defendants First Alabama Bank and Edward Herbert in the state action, which was filed therein on January 17, 1983.

THE COURT: Contentions?

MR. WILSON: The contentions as to the matters that were raised in that lawsuit.

THE COURT: Is that a state court pleading I am not familiar with, or —

MR. WILSON: Yes, sir.

THE COURT: What is it?

MR. NACHMAN: It has arisen recently, Your Honor. I dont' know what kind of animal it is.

MR. WILSON: The state court requested that all parties file written statements of their contentions of **[12]** the issues in that lawsuit, what as to the Plaintiff . . . It is similar to what this Court requires prior to encompassing that in a pre-trial order. But in the state action, no pre-trial order was entered. But the case was tried on the basis of the contentions filed by the parties.

THE COURT: I follow you.

MR. WILSON: Exhibit 10 is the contentions of the Plaintiffs, Parsons, Parsons Steel, Inc., Jim Parsons, and Melba Parsons, in the state action, which were filed on January 13 of 1983.

Number 11 would be the Defendants, in the state action, motion for reconsideraton and renewed motion for summary judgment. This, again, based on the res judicata ground, and was filed in the Circuit Court action on January 19, 1983.

Exhibit 12 is the list of documents filed by Defendants First Alabama Bank and Edward Herbert in the state court action on January 26th, 1983.

Exhibit 13 is Defendants' Bank and Herbert's alternative motion to reconsider or for a continuance, which was filed January 28, 1983 in the state court action.

Exhibit 14 is a cross-claim by Defendants Bank and Herbert against O.S.I. and Michael Orange, the other [13] Defendants in the state court action. This cross-claim by the bank was filed on January 28, 1983.

Exhibit 15 is another renewed motion for summary judgment by these Defendants filed January 28, 1983.

Exhibit 16 is, in the state action again, the objections of the bank and Herbert to the dismissal of the other Defendants pursuant to a pro tanto settlement which was reached between the other Defendants, Mr. Orange and O.S.I., and the Plaintiffs in that case.

Exhibit 17 is an amendment to the Answer of the Defendant First Alabama Bank asserting that the pro tanto settlement was a complete bar to the state action. This was filed on January 17, 1983.

Exhibit 18 is the same pleading filed by the Defendant Herbert; and amendment to his Answer, filed January 28, 1983.

Exhibit 19 is the Answer of First Alabama Bank to the Plaintiff's Complaint in the state action. It was filed on March 25 of 1982 and asserted a counterclaim against the Plaintiffs, as well as answering their initial Complaint.

Exhibit 20 is an order from the Circuit Court denying Bank and Herbert's renewed motion for summary judgment. This order is dated January 31, 1983.

Exhibit 21 is the Defendants' requested voir dire **[14]** questions of the jury panel in the state action, which was filed on January 31, 1983.

Exhibit 22 is a certified copy of the jury verdict in the state action and the judgment of the Court affirming that jury verdict.

THE COURT: All right, sir.

MR. NACHMAN: We have no objection to those exhibits.

THE COURT: All right, sir.

Mr. Wood?

MR. WOOD: Your Honor, I had planned to offer the renewed motions to dismiss of the bank that are now Exhibits 1 and 2 for Parsons. And, so, I don't have any exhibits to offer. I will adopt those first two.

THE COURT: All right. Thank you.

Now, one group, the Plaintiffs, got their briefs in in time for me to read them. Mr. Wilson got his in this morning, but I did little more than scan them. I haven't even seen yours except I know that they are in there.

MR. WOOD: Yes, sir.

THE COURT: I tell you that so as to . . . It might be pertinent to your argument. I will give you such time to argue this case as you want. Do you have some idea as to what time you need?

[15] We will start with Mr. Nachman. Have you had an opportunity to look at the briefs?

MR. NACHMAN: No, sir. They were handed to me this morning.

Your Honor, I am prepared to argue this morning. If the Court would prefer to re-schedule argument until after all the briefs are —

THE COURT: No, sir. I had rather hear you this morning and then decide whether or not we need any more. I don't know whether we do or not. I think I understand the position the parties are taking.

Mr. Wilson, of course, in addition to the things you anticipated, has taken the position that, assuming you are relying on res judicata or collateral estoppel, as they may relate to each other and the facts of this case, that you are estopped to assert your estoppel because of your participation in the state case.

MR. NACHMAN: I understand that and am prepared to argue that.

THE COURT: And I think the other things that he raises have been anticipated by you and pretty well covered in your briefs. I, of course, do not know what Mr. Wood has taken to task in his brief.

Have you done anything startlingly different from what Mr. Wilson did?

[16] MR. WOOD: I have done nothing that will startle Mr. Nachman. He knows our position.

THE COURT: All right. You may startle me, but I reserve the right to be startled.

MR. WOOD: Yes, sir.

MR. NACHMAN: Shall I proceed?

THE COURT: Yes, sir. How much time do you need to the side?

MR. NACHMAN: I would say fifteen minutes, with maybe five minutes rebuttal.

THE COURT: Well, I think you are being modest. Let me give you thirty minutes, if you need it, to the side.

Is that enough for you, Mr. Wilson?

MR. WILSON: I think that would be more than enough.

THE COURT: I would think if it is enough for them, it is enough for you?

MR. WOOD: That is right, Your Honor.

THE COURT: All right.

MR. NACHMAN: If the Court please, I will start on the last point that was mentioned a few moments ago; namely, whether we are estopped by continuously raising the res judicata and collateral estoppel defenses in the state actions and going ahead with a trial before filing an independent action in this court seeking injunctive [17] relief under Section 2283 under Title 28, saying to this Court that it is now necessary — to use the words of the statute — that this Court issue that injunction in order to protect or effectuate its judgment in the federal action, as we denominated in our pleadings.

Now, the answer to the question is a very simple one. The fact that the federal courts have jurisdiction — and they do without question have jurisdiction as the Fifth Circuit, for example, has repeatedly held in Southwestern Airlines and other cases we have cited — they have independent jurisdiction under 2283 to issue an injunctive order to protect or effectuate its judgments. This does not mean, as the cases and the commentators are plain to point out, that all other aspects of the appropriateness of injunctive relief go out the window. They do not. And notably those that remain are that there must be a necessity for an injunction, realizing that it is an extreme form of judicial relief, and that there must not be any other adequate remedy. And, moreover, where state and federal courts are involved, traditional doctrines of comity also are present when a federal court is asked to enjoin a state court.

And, so, the answer, as I say, is quite simple: Had we not raised repeatedly and given, up to the very day of the trial, an opportunity to the state court to **[18]** rule on this matter, the first thing we would have been faced with over here would have been that we had not asked the state court to rule on this defense and how do we know it isn't going to do so.

Not only did we raise the defense in all the pleadings that have been introduced here, but we also raised it in motions for directed verdict . . . two motions for directed verdict by each Defendant, Bank and Herbert, during the course of the state action and, also, in the judgment n.o.v. which has not been ruled on. Why is it necessary now . . .

Well, before I get to that, let me also say that in addition to all of the matters that the Defendants here have put in, the minutes of the Circuit Court which we introduced will show that we even asked the Court to certify an interlocutory appeal to the Supreme Court of Alabama so that the Supreme Court of Alabama, in advance of a long and burdensome trial, could rule on that question. And that, too, was denied by the Circuit Court.

The record in the state court will also reveal that the motions of these Defendants here — Plaintiffs in the State action — for summary judgment on our counter-claim were based, remarkably enough, on the argument that res judicata and collateral estoppel barred our counter-claim because we had filed a counter-claim in **[19]** this federal action. And, lo and behold, the state court granted those summary judgments and dismissed our counter-claims on the basis of res judicata.

So, when we got a four million dollar judgment which we have now had to stay execution on and when we are now faced with another one hundred nineteen million dollar lawsuit which alleges in many, many paragraphs matters relating to this state action that was tried, and saying that there was collusive effort among the Defendants in that new state action to force a settle-

ment of the state action, it is clearly related to this. Because if it is barred by res judicata, the whole thing falls to the ground over there.

Now, there is no waiver, there is no estoppel of raising the matter that a federal injunction is necessary to protect or effectuate this Court's earlier judgment. Either it is necessary to protect it, or it isn't necessary to protect it. And we say it is patently clear at this time that a federal injunction is necessary to protect this Court's order because we are now in the stage of harassment and re-litigation, and the really burdensome features — not that there haven't been burdensome features already from the state court litigation, but nothing like what we are now faced with.

We gave the state court every conceivable opportunity **[20]** to . . . motion after motion after motion, even a continuance on the day of trial was sought, and motions for directed verdict, motions for judgment n.o.v., everything we knew how to do to try to raise this matter in the state court, and we haven't been successful.

Now, we have cited in our brief and discussed at some length the case of Bank of Heflin in Bank of Heflin against Miles, at 621 Fed2d 108. All of these matters were involved there. A federal court injunction did not come down in that case under Section 2283 until after the case had been to the Supreme Court of Alabama for the second time and the Supreme Court of Alabama had sent the case back to state circuit court with instructions to assess a statutory penalty, which is available where stockholders asked to look at corporate records and are denied access to corporate records. And if the courts, as Your Honor knows, hold that the stockholders are entitled to look at the corporate records, then they are also entitled to a statutory penalty because of the corporation's failure to make those available. And it was . . . In an earlier action after the state court had originally ruled that the records were available for inspection, bank records were available as ordinary corporate records were

available for inspection by stockholders of the bank, the bank and the FDIC went into the federal [21] court in Birmingham and obtained an order that the FDIC records could not be inspected. Thereafter, the Supreme Court of Alabama not only held that they could be, but that reversed . . . remanded the case to the circuit court, as I say, for assessment of a statutory penalty. And at that stage, a new action was entertained by the Federal District Court in Birmingham, Judge Guin, and he issued an injunction under 2283 enjoining all those state proceedings and nullifying all state court orders, including orders of the Supreme Court of Alabama. And this was done after two trips to the Supreme Court of Alabama in the case and hearings in the circuit court.

This injunction was upheld as necessary to protect the earlier order of the federal court in a related case that the FDIC records could not be inspected by stockholders of this bank.

So, as I say, the essential issue is: Is it necessary for this Court to enjoin any further proceedings and to nullify the state court orders which conflict with its judgment n.o.v., dismissing this action.

Now, as to the similarity, we have given a side by side comparison of the allegations in the state complaint; allegations not only of these Defendants but adopted by those Defendants. Insofar as the parties are concerned, the citations to Aldinger are misplaced. What they are [22] saying to the Court then is that Orange and O.S.I. and the Montgomery corporation — which is in bankruptcy now and represented by the Trustee — were not parties to the litigation before Your Honor. They were not. That is correct. But that circumstance is legally irrelevant.

Insofar as Orange and O S.I. were concerned, number one, they were dismissed from the state action after the settlement with them. But even if they hadn't been, they could have been made parties to the federal litigation before Your Honor. Many of the cases of — and I won't read the citations. Harper, for ex-

ample, that we have cited in our brief — point to the liberal joinder provisions in the federal courts and the pendent jurisdiction of the federal courts, to hold that a person is bound not only by what he raised in the federal court but what he could have raised in the federal court.

THE COURT: Let me interrupt you just a second now. I don't think this will throw you off and it is distracting me just a little bit.

O.S.I. was Orange's corporation under which he was operating?

MR. NACHMAN: That is correct.

THE COURT: My recollection is hazy about that.

MR. NACHMAN: That is exactly correct, Your Honor.

THE COURT: All right.

[23] MR. NACHMAN: The Aldinger case and the later Kroeger of the Supreme Court of the United States do not hold, as the Defendants here would have Your Honor believe, that there is no pendent party jurisdiction in the federal court. Quite the contrary. What those cases hold is that unless there is a demonstrable, manifest, congressional intent that certain parties not be . . . certain persons not be parties in the federal court, under the limited jurisdiction of the federal court, then there can be pendent party jurisdiction and, indeed, is.

In the Aldinger case, what the Supreme Court was careful to point out was that a county cannot be a party in a 1983 action because Congress, when it enacted 1983, did not consider that counties were persons within the meaning of Section 1983 of Title 41. And in the later Kroeger case, which was a diversity matter where a non-resident . . . where an Iowa resident sued a non-resident of Iowa, and then the non-resident of Iowa sued . . . interpleaded a resident of Iowa as a third party-Defendant, and then the Plaintiff also sued the third party defendant, and the

court dismissed the non-Iowa defendant, leaving only an Iowa plaintiff and an Iowa defendant in the case. The court held that there could not be pendent party jurisdiction in that case because Congress had indeed made an expressed determination that there was [24] to be no federal jurisdiction based on diversity of citizenship where the plaintiff and the defendant were residents of the same state.

But, again, the court was careful to point out that it was not talking about subject matter jurisdiction where . . . which was based upon a federal statute or the federal Constitution, which is the case in Your Honor's case because that was based under federal statute.

Now, there are several cases cited by the Fifth Circuit . . . I mean, the Eleventh Circuit and by us arising out of the Bank Holding Company Act — they were cited by the Eleventh Circuit in the case which upheld and affirmed Your Honor — Tose from Pennsylvania, Duryea from the Seventh Circuit, Clark from the Tenth Circuit. In each one of those cases, number one, state fraud actions, state interference with advantageous business relation actions, other types of commercial tort actions were joined with an assertion of liability under the Bank Holding Company Act, just as they could have been in the case before Your Honor. And, in addition to that, persons other than banks were defendants along with the bank in those actions. In Tose, for example, and in B.C. Recreation, for example, and in Duryea, for your example.

So that there is no reason under the sun why these persons not only couldn't have tried to bring these other [25] parties and bring these other causes of action before Your Honor when they, not we, invoked the jurisdiction of the federal court and sued under the Bank Holding Company Act. The odds are overwhelming that had they done so, they would have been accepted. But that is not the case; that is not the test. The test is whether they tried or not, and they didn't try and they elected not to true.

And if Your Honor will read the side by side comparisons of these two Complaints, the federal and state Complaints, and see that they are literally identical in all relevant aspects.

Now, as to the Trustee in Bankruptcy. First of all, many of the cases we cite make it plain that a party can be bound by collateral estoppel or res judicata, for that matter, in an action in which he has not actually been a party, provided his interests are adequately represented.

Now, what do we have here? First we have the Trustee representing the Montgomery corporation which is wholly owned by the Mobile corporation. The Mobile corporation was a party in the federal action, a party-plaintiff. And ninety-nine out of one hundred shares of stock in the parent corporation were held by the two other Plaintiffs in the federal action before Your Honor. That alone would be enough, but that is not all that there [26] was.

The laboring oar, the interests that were asserted to get money for alleged wrongs to the Montgomery corporation — and those are the matters that were before Your Honor: Wrongs alleged to have occurred to the Montgomery corporation, failure to lend the Montgomery corporation money, improperly levying on the assets of the Montgomery corporation and selling them — alleged in both Complaints — in a commercially unreasonable manner. These matters were fully litigated before Your Honor. The representation was highly adequate by Mr. Beasley and Mr. Wilson. And they were so adequate that the Trustee, in making these same arguments in state court, his witness list was, "we designate the witnesses from the federal action," there is no question that there was adequate representation.

And in the Southwest Airlines case that we have cited, for example, eight parties were held to be bound which were not actual parties in this case. In the Montana against United States case which is cited in any number of the cases we have cited, the

United States government was held to have been bound by representation of a public contractor who was suing in the state courts of Montana to contest the constitutionality of a gross receipts tax on public contractors, which the economic burden would fall **[27]** on the federal government for which the contractor was doing this business, and the United States government tried to bring another action in a three judge court to enjoin this statute as unconstitutional. The United States Supreme Court in Montana said, "It has already been litigated. You are barred by res judicata and collateral estoppel because the private contractor adequately represented the interests of the United States government in that case."

So, we say, Your Honor, that this is a classic case for the protection of jurisdiction and the judgments of this Ccurt which have just been flaunted in the state court action. It was simply a re-litigation of a matter that had been litigated before this Court on the matter of the reasonableness of the sale. It was one . . . It had to be one of the primary bases for the award of any damages to the Trustee in Bankruptcy. Your Honor, in your judgment and finding of facts, which was summarized in our Complaint, found that there had been a waiver of notice, et cetera, by Parsons in connection with that sale. This, of course, was re-litigated in the state action.

So, it is a . . . If this injunction does not issue, then the protection of res judicata and collateral estoppel is simply gone, and we will be subjected to the enormous burden now of fighting off a levy of the four million dollar judgment — or, the attempted levy of it — of having **[28]** an expensive appeal and having to defend another one hundred nineteen million dollar lawsuit, all arising out of matters that were fully litigated or which could have been fully litigated in this Court. And I earnestly urge this Court to grant the injunctive relief and nullify the conflicting state court judgments which have not only undermined but torpedoed this Court's judgment which has been upheld by the Eleventh Circuit.

Let me also say in terms of chronology where we were in the state court as far as Your Honor's judgment is concerned.

While it was on appeal to the Eleventh Circuit, it was obviously not a matter of complete certainty whether Your Honor would be affirmed or reversed. The judgment affirming . . . the judgment of the Eleventh Circuit affirming Your Honor came down in June of 1982. And an application for rehearing was then filed by the Parsons and that was denied in August of 1982. As Your Honor knows, there is a period of ninety days within which certioari could have been sought in the Supreme Court of the United States. So, that period ended in late November, 1982.

Obviously, not only considerations of comity and an attempt to exhaust available legal remedies dictated that we raise these matters in the state court, but had Your Honor's judgment not stood, then we would have really [29] had a case of waiver in the state court for not having raised it. We raised it — there is no question — over and over again in the state court and we gave the state court every chance in the world to rule on this thing and rule correctly, but it didn't. And it is now, as I began saying, necessary for this Court to give us some injunctive relief.

Thank you.

THE COURT: Let me ask you a couple of questions before you sit down.

As to the applicability of the doctrine of res judicata as it may bear on your being estopped to raise it at this point. What is the purpose of the doctrine of res judicata?

MR. NACHMA'[illegible]: To prevent the disruptive burden of re-litigating matters which have been re-litigated or which could have been litigated in a prior action, and to avoid unfairness and waste of judicial time and waste of clients' time, and . . . just that re-litigation is a burden which shouldn't be tolerated in a judicial system..

THE COURT: In view of the fact that it is, at least partially, the burden on courts that is sought to be protected, I question that a party has a right to waive it or be estopped by continuing in the litigation.

I could see the contention of the Plaintiff that [30] you continued to litigate and you put them to a lot of expense without bringing this matter to this Court initially. On the other hand, I suppose . . . I know these lawyers — Plaintiffs in the state court — and I know that they were making every effort to state different causes of action to avoid res judicata or collateral estoppel in that matter, and it may very well have been — and I make this comment for all of you to answer, if you wish — it may very well have been that it was very difficult to explain to the state court at that point that the res judicata or collateral estoppel would apply.

Is that or is that not so?

MR. NACHMAN: That, I don't believe, is correct, Your Honor. I don't think the . . . The Defendants here can speak for themselves.

I don't think they are saying that we waive the res judicata defense in the state court. I think what they are saying —

THE COURT: — waived the right to come back here with it.

MR. NACHMAN: That is what they are saying, Your Honor.

THE COURT: — at this stage.

MR. NACHMAN: As I began . . . Let me read it, if the [31] Court will permit me, from Section 4226 of Wright and Miller: A party seeking an injunction . . . We are talking about —

THE COURT: Did you cite that in your brief? You haven't gotten around to briefing that point, have you?

MR. NACHMAN: No, sir. But it is cited in the cases . . . some of the cases that we have cited.

THE COURT: Well, give me that cite again.

MR. NACHMAN: Section 4226 of Wright and Miller.

THE COURT: All right.

MR. NACHMAN: The discussion thus far has been concerned with when the federal court, by virtue of the third exception to 2283 — and to interpolate, that is this re-litigation section we are talking about — has power to stay proceedings in a state court. The mere existence of power does not mean that this power is to be exercised as a matter of routine. A party seeking an injunction must always satisfy the usual, equitable test for an injunction of irreparable injury and absence of an adequate remedy at law.

And what we are saying, Your Honor, is if we hadn't tried to get the state courts to rule correctly on this question of res judicata or collateral estoppel, if we had come right after this Court . . . let's just say, right after this Court issued its judgment n.o.v., if we had come **[32]** immediately to this Court and said, Your Honor, there is a state court case pending that is just like this one and it barred by res judicata or collateral estoppel, please, Your Honor, issue an injunction. I think these parties would have said and I think Your Honor may well have said to us, "Well, look. You haven't given the state courts an opportunity to rule on that question yet. You haven't shown me that there is no adequate remedy at law. You haven't shown me it is necessary for this Court to issue an injunction to protect or effectuate its judgment because, if the state court holds with you on your res judicata and collateral estoppel defense, then my judgment will have been protected and effectuated and it will not be necessary for me to enjoin the state court proceeding." So, what we say is, it was necessary for us to pursue those defenses in the state courts as far as we could pursue them

before coming here. And had we not done so, as I say, we would have been met at the threshold here with, "Why didn't you do so?"

But, Your Honor, we submit it is absolutely correct that at some point the judicial system is involved, and Your Honor, as the representative of the judicial system, is not to be waived or estopped from saying, "it is now necessary for me to issue this injunction to protect my earlier judgment and to protect my jurisdiction." And [33] this is what Judge Guin did in the Bank of Heflin case.

THE COURT: All right, sir.

MR. WILSON: May it please the Court, as Mr. Nachman stated, we are dealing with an equitable remedy, an extraordinary remedy. And in this case, not only that, but we are dealing with a request that this Court intercede in the proceedings of a state court, which I would characterize as the most extraordinary remedy you can ask a federal court for.

So, with that idea in mind of where we start today, I want to go back and talk about some of the things that Mr. Nachman talked about.

On the question of waiver or estoppel: It is not the fact that he has argued res judicata in the state court that we say means he has waived and estopped it. It is our position that it is these Plaintiffs that are relitigating. They have made a strategical decision that they were going to state court and attempt to pursue the litigation. In that state court litigation, not only have they defended our Complaint, they have asserted a counterclaim, they have asserted a third party complaint and sued Mr. Orange and O.S.I. They have fully gone through litigation and availed themselves of the jurisdiction of that state court for discovery, for their counterclaim, for their cross-claim, and now that they were not able to [34] persuade that court and jury that they should prevail — they raised a number of other defenses as well as res judicata. They said that Mr. Parsons consented, they

said that Mr. Parsons waived, they denied having . . . denied any wrongdoing. Now, after putting the state court through a nine day trial, they come back to Your Honor and say, "Well, we are dissatisfied with the rulings we have gotten in state court, and we want Your Honor to act as an appellate court for the state court, and reverse their decision," essentially.

THE COURT: In other words, both sides now are claiming that the other side is dissatisfied with an earlier judgment in court and has gone into another court and tried to change it?

MR. WILSON: That is exactly right, except, of course, we deny we have done that. And I am going to get to that point in a minute.

But as far as the estoppel, this is an equitable remedy that they seek. You have to do equity to get equity. You have got to have clean hands. The normal equitable principles apply here.

I cannot imagine anything more inequitable than to let these Defendants wait back and see: "We are going to wait and see how we come out. We are going to go through twenty months of litigation. We are going to [35] fight them tooth and toenail, we are going to raise every defense available to us" — which, of course, they have a right to do and should do — "we are going to put witnesses on the witness stand, take up nine days of court time, we are going to put witnesses on the witness stand, we are going to deny what they say occurred occurred." Then after we . . . "and we are going to sue someone else — "

THE COURT: Sounds like you are the pot calling the kettle black. You did the same thing.

MR. WILSON: No, sir, we did not do the same thing.

THE COURT: Well, you are accused of doing the same thing.

Go ahead.

You waited until you saw how you came out in federal court—

MR. WILSON: No, sir.

THE COURT: — dissatisfied.

MR. WILSON: No, sir. The state court action was filed in February of 1979 and was pending four months before the federal action was ever filed.

THE COURT: Did anybody call that to my attention when I was trying to get to the federal action?

MR. WILSON: No, sir.

THE COURT: That is interesting.

Go ahead.

[36] MR. WILSON: And that is another point that we make: If they were the same cause of action, it appears that the Defendants would have brought that to your attention at the same time. But clearly they were not, Judge.

Let's go back and review that federal court action. There are two points that we make.

There is no dispute that you can't relitigate issues that were already determined in the federal court. Mr. Nachman has got a number of cases to that, and we don't dispute it. In fact, Heflin is a good example, and I am going to get to that in a minute — totally different from the situation here, but a good example.

In the federal court lawsuit, we alleged that under the Bank Holding Company Act, which is 12 USC 1972, that by demanding that Mr. Parsons take in Mr. Orange as manager and stockholder, they violated that Act. If Your Honor will remember, at that point, it had never reached the Court of Appeals in this circuit but one time and that was on a motion for judgment on the pleadings. The defendants in that case, on at

least . . . I recall at least five different times we came here and argued before Your Honor, and they said you had no jurisdiction of the federal complaint; that the things we allege did not constitute a violation of the Bank Holding Company Act. After the trial, Your Honor determined the same thing; [37] that the requirement did not meet the . . . was not a violation of the Bank Holding Company Act. And, indeed, in the Eleventh Circuit opinion they said that while this might be a "unusual transaction" — you remember that was the definition that gave us trouble in that action — "it was not a tying arrangement to fit within the Bank Holding Company Act because they did not tie the loan to another service from the bank." Mr. Orange was merely brought in to increase the security on the credit because they were comfortable with him.

Now, in the face of their five or six motions, continuous argument to this Court that you had no jurisdiction of this federal complaint, they tell you that we should have dismissed a pending state proceeding and tried to pendent those claims with the federal claims that were in this court at that point. And even if that is not absurd enough, they say not only should we have brought some additional claims against the bank, but we should have brought in another plaintiff and two . . . three more defendants into federal court. When they were arguing every day and we were before Your Honor six or seven times to question whether or not you had any jurisdiction of the federal complaint itself.

This brings us to an analysis of the Gibbs' decision; pendent jurisdiction. In there the question . . . [38] Of course, the immediate inquiry is whether it arises out of a nucleus of operative facts. There are three other exceptions that Gibbs talks about. First: Do the state claims overwhelm the federal claim? Second: Is there . . . Would there be an opportunity for confusion with the jury if you tried them all together?

THE COURT: Well, if there had been an opportunity to confuse the jury, it would be in your favor, wouldn't it?

MR. WILSON: No, sir. The action we brought in federal court was . . . and I want to point out one thing that I did not bring out.

Your Honor had so much doubt about whether or not the actions that we asserted were actually a violation of the Bank Holding Company Act, that you ordered the bifurcation of the trial, to try it on liability first to see if the actions we complained of would in fact prove to be a violation of the Bank Holding Company Act before we went to the additional expense of discovery and trial of the second point.

The issue in federal court was a very narrow and simple one: Was there a violation of a specific, narrowly construed statute in federal court?

THE COURT: That was based on a pleading that you filed.

MR. WILSON: Yes, sir, that is exactly right.

[39] THE COURT: Go ahead.

In the state court, we have got four plaintiffs and four defendants. We have got one plaintiff and three defendants that are not even parties to the federal court. We have claims of commercially reasonable sale which occurred a long time after the violation of the Bank Holding Company Act which we alleged occurred.

THE COURT: Now, wasn't that proved or wasn't . . . Wasn't that proved in the damages you claimed against the bank?

MR. WILSON: Your Honor, we never got to the damage stage in the federal court lawsuit, as I remember.

THE COURT: I seem to have some recollection about that. I don't know what stage it came up in. It may have been in the part where we were talking about whether or not we should bifurcate the case. I am sure I didn't just bifurcate it in the dark. I talked to you gentlemen about it.

MR. WILSON: Yes, sir.

THE COURT: And I did have a question about whether you had a cause of action and I did think it would be foolish for the parties to have to pay for litigating the damages question if there were no liability question.

MR. WILSON: And it ultimately —

THE COURT: But I also talk about what damages you [40] were interested in, I think, and that is where I got into my head that you were claiming damages for the way the sale was operated, as a result of the Bank Hold Act violation, as I recall your claim.

MR. WILSON: Well, Your Honor, let me say this additionally.

We were not the parties who owned the collateral that the bank sold. That was the Trustee. Any damages we might have would not have flowed from that aspect of the case because under UCC they were the ones who would assert the damages for commercially unreasonable sale, is the person who owns the assets. And, of course, here . . . As I recall the damage we sought, it was essentially to Mr. Parsons' business reputation, based on the actions that Mr. Orange did after he got in there.

THE COURT: All right. Go ahead.

MR. WILSON: Under the Aldinger versus Howard decision the Court, the Supreme Court, specifically states that there is a great distinction between pendent jurisdiction — that is, bringing in several claims against a defendant that this Court has jurisdiction of — and bringing in other defendants. And the basis of this is that the federal courts are courts of limited jurisdiction. When you attempt to assert what is termed pendent party jurisdiction, you are attempting to bring in people who, ad- [41] mittedly, there is no independent claim of federal jurisdiction against. And that is essentially what Mr. Nachman says now, although he said the Court didn't have any jurisdiction of

the federal claim at that time. He says now, we should have attempted to bring in these other parties.

I would submit to the Court that he has now asserted a cross-claim against Michael Orange and O.S.I. He could have brought them into the federal litigation as well as the plaintiff could have, assuming that he has a cross-claim to assert.

THE COURT: Well, if the bank is charged with a violation of the Bank Holding Company Act, I don't understand how the bank could counterclaim for damages that they caused under the Bank Holding Company violation against anybody. They are the ones that violated the Bank Holding Company Act.

I don't follow your argument.

MR. WILSON: Your Honor, that is my argument. They are the ones who violated the Bank Holding Company Act —

THE COURT: Well, you are trying to say they are just as guilty as you were for not bringing Orange and O.S.I. into the federal litigation. But I can't buy that because they couldn't have brought them in under the Bank Holding Company Act claim.

MR. WILSON: Your Honor —

[42] THE COURT: They are the only ones liable for that. Somebody else wouldn't be liable.

MR. WILSON: That is exactly my point. I couldn't have brought them in either under the Bank Holding Company Act because the bank is the only party that could be liable under the Bank Holding Company Act.

THE COURT: You can bring in a joint tortfeasor who contributes to your damages. And that is what you are now really contending; that Orange and the bank were joint tortfeasors proximately causing your injuries or damages, aren't you?

MR. WILSON: Yes, sir, for the causes of action that we asserted in state court they were certainly joint tortfeasors. That is the point. There has got to be some federal jurisdiction to bring those other parties in. That is the reason why it was necessary in this case that there be two causes of action.

THE COURT: Not if it all arises out of the same series of transactions.

MR. WILSON: That is the Aldinger versus Howard case, Your Honor. That there are — When you talk about bringing in a number of counts against one defendant who this Court has got jurisdiction of, you are talking about one thing. When you are talking about bringing in parties that this Court does not have jurisdiction of, **[43]** then you are talking about entirely another. And there is substantial doubt whether or not the Court has power to bring in other parties that it does not have any independent ground of jurisdiction on. And that is the holding in the Supreme Court case of Aldinger versus Howard.

As Your Honor mentioned in a question to counsel for the Plaintiffs here, the whole purpose of res judicata is to avoid unnecessary litigation, duplicative litigation, and to conserve what is recognized to be precious judicial resources. That is the basis for our argument to Your Honor that these parties cannot wait and take a chance on how they will come out in the state court, put that court . . . if they have got a basis for this injunction, which we submit they do not, they can't now wait and see. If they had gotten a verdict for the Defendant in the state court action, certainly they would not be here before Your Honor. They have taken their tactical choice to go before the state court, to assert their counter-claims, cross-claims, litigate that matter fully, and they now come back and say that res judicata, whose policy is to avoid unnecessary trials, requires that Your Honor enjoin the state court litigation.

I cannot imagine a greater intrusion or affront on comity than what they are asking you to do. We have had arguments before

two state court judges concerning this **[44]** issue of res judicata. The plaintiffs have been fully able to argue —

THE COURT: Who were the two? I didn't know that.

MR. WILSON: Yes, sir. The state case was assigned first to Judge William Gordon. Later he found it necessary to recuse himself and another circuit judge took the case over — Judge Sam Taylor. When he did, the bank went through the same motions for summary judgment, went through an entire argument of the same situation again.

THE COURT: I see.

MR. WILSON: Now they are saying . . . They have the opportunity to present that same defense to the Alabama Supreme Court, but they are asking this Court to virtually slap the face of those state court judges and the jury that heard this lawsuit and, indeed, the Alabama Supreme Court. Because what they want you to say is that the courts of Alabama are not . . . do not have the ability to hear their defenses and, therefore, they have got to come back to this Court to ask Your Honor to reverse what the state court has done.

In the Bank of Heflin versus Miles case, it is true that eventually the court enjoined a decision of the Alabama State Supreme Court. But if you look at the case of Miles, it is a totally different situation. Here they **[45]** are saying that these claims we brought, could have, and should have, are barred by res judicata; not that we had the opportunity to adjudicate them but that we could have.

In the Bank of Heflin case, you have got, on the one hand a state court order saying, "Turn over FDIC records," On the other hand, you have got a federal court order saying, "Do not turn over FDIC records because federal law prohibits their disclosure." You have got a direct confrontation of two orders. It was clear that the Court in that case, in order to protect its judgment, had to grant relief that was sought. In this case, Your

Honor's judgment was merely on the Bank Holding Company claim, There was no judgment on the merits on any other issue; on any of the issues raised in the state court. At this point, there is no state court judgment which directly confronts the decision that Your Honor made. And that is a great distinction.

We would submit to Your Honor, that it would be an abuse of discretion to interfere in state court . . . in an on-going state court proceeding under the circumstances of this case.

THE COURT: Well, let me ask you a question or two before you sit down.

In the federal court proceedings, we wound up with one cause of action; a violation of the Holding Company [46] Act, as I understand it. Is that right?

MR. WILSON: Yes, sir.

THE COURT: Now, what causes of action did you have in state court?

MR. WILSON: All right, sir. We had a cause of action for fraud —

THE COURT: Against whom?

MR. WILSON: Against Mr. Herbert and against the bank.

THE COURT: And those . . . The circumstances for supporting that fraud were the same circumstances, were they not? Or were they?

MR. WILSON: No, sir, Your Honor. I think it is —

THE COURT: That you insisted supported the Bank Holding Company Act?

MR. WILSON: Your Honor, I think it is important that Your Honor understand the content . . . that is why I put into evidence this morning the contentions of the Plaintiffs and the Defendants in the state court lawsuit.

THE COURT: I understand that. But I am asking you what the difference is. I don't know.

MR. WILSON: All right, sir. The fraud alleged in the state court lawsuit included employees of the bank, other than Mr. Herbert, began in January of 1978 with promises of additional loans, including . . . went into **[47]** September of 1978 with additional loans and went right up through the Bank Holding Company violation.

THE COURT: Well, now, wherein did you contend that you had any consideration for those promises?

MR. WILSON: It was not a contractual . . . The allegation was that at the time they made the promises, they had no intention to perform them; therefore a violation under — I believe it is, 6-5-105 of the Alabama Fraud sections. It was a promise made with no intention to perform —

THE COURT: That would be a binding promise?

MR. WILSON: No, sir. It is not a contractual type . . . We did not assert a contractual claim and there would be no necessity of any consideration for it. There would have to be some damage to the person having relied on those promises, certainly, yes. And the damage was that he continued his relationship with the bank, did not attempt to get any outside financing, and put more money into the Montgomery corporation and did not sell off the inventory — things of this type — relying on the promise of additional loans.

Then there is another cause of action arising out of Mr. Orange's relationship with the subsidiary which . . . Well, the Parsons-Montgomery. A breach of fiduciary duty which, of course, an officer of a corporation has to the **[48]** corporation and shareholders.

It was alleged that because of the relationship involved, the bank had a fiduciary duty to the corporation and shareholders as well.

Then, the additional causes of action arose in January when the assets were repossessed and sold under the Uniform Commercial Code.

So, essentially, you had claims of fraud which arose out of different circumstances than the Bank Holding Company Act, you had a claim for fraud against Mr. Orange, and you had the UCC violation, and the breach of fiduciary duty of the corporation, as well.

Your Honor, I think that is important. If . . . Let me see if I can find the case.

In this Wood exploration case which Mr. Nachman cites, res judicata bars litigation . . . you know, what is a cause of action? That gets down to the bottom line question: What is a cause of action? That case sets out the test for a cause of action which says that causes of action are the same when the wrong alleged is based on the same conduct by the defendants. And that is why this case, we say, that it is not the same cause of action because it is not based on the same conduct of the defendant. There is differing conduct upon which the wrong is based: The Bank Holding Company Act on the one hand, and the broad, [49] Uniform Commercial Code, violation of fiduciary duties on the other hand in the state court action.

THE COURT: Well, you get mighty close to a situation where a man is driving an automobile and runs a red light and runs over somebody and you sue him alleging that his negligence was running the red light and you lose. And then you come back and you sue him alleging that his negligence was not looking up the road to be sure the road was clear and you win.

Now, you have got two different things that you say amount to negligence, yet they all are connected with the same transaction.

I understand that this is a bigger, wider, situation but it is thing that bothers me about this situation. How far can you go

with it? The damages you insisted on, they way you were hurt, all arose from the conglomerate of these things, as I understood the prior lawsuit. You stated a cause of action in one way in the federal case, and then you came back and stated a different cause of action in the state case.

Can you educate me a little on that matter?

MR. WILSON: Your Honor, I think the example you have given is an excellent one. That would clearly be res judicata in that instance. You have got one car wreck, one action . . . one piece of conduct by the defendant. **[50]** You are merely asserting different theories of relief for the same cause of action for the same conduct: He ran the red . . . Well, he hit your car. You claim he is negligent; he ran the red light. He is negligent because . . . Well, for whatever other reason — he was speeding. Whatever reason you want to give.

In this case, you have got different conduct complained of. The Bank Holding Company Act violation, as the Swardlow case and cases under that section hold, if it occurred — of course, the ultimate decision was that it did not occur — if it occurred, it occurred at the moment that they made the illegal requirement.

Let's assume a case that would definitely be a violation of the Bank Holding Company Act. If you want this loan, you have got to send all your paper . . . a car dealer; you have got to send all your paper back to our bank. That would definitely be a violation. A violation occurred right there. That is conduct upon which the Bank Holding Company Act cause of action would be based. In this instance . . . And it was based on one . . . In our case, it was based on one meeting between representatives of Parsons and the bank at which alleged illegal requirement was made.

The state court action is based on differing conduct, conduct of different people including Mr. Bill Richard- **[51]** son, who

was an employee of the bank; alleged a cause of action based on promises and conduct that he performed —

THE COURT: Well, you sought to hold the bank, in the case you tried here, partially on the statements of Mr. Richardson, as I recall it. It was integral part of the trial of the case in the federal court.

MR. WILSON: Your Honor, I believe that the —

THE COURT: I have forgotten all the details.

MR. WILSON: The significance of Mr. Richardson's testimony . . . If you will remember, the bank said in the Holding Company action, not only did we not condition a loan on an illegal requirement, but we told you we weren't going to give you any more loans because your company was in horrible shape. And the testimony of Mr. Richardson went to the question of whether or not in fact the company was in horrible shape, in that he never put anything in the records to show it. That was what we showed through Mr. Richardson. I believe he was called as a witness for the defendants.

As Your Honor made clear in his opinion on the j.n.o.v., — and was not disputed by us — we were not claiming anything Mr. Richardson did as a violation of the Bank Holding Company Act. I think that is clear in our contentions in the pre-trial order and Your Honor discussed that in your j.n.o.v. opinion.

[52] So, I believe that while Mr. Richardson's testimony — your recollection is correct. It was important to the case — there was no claim that anything he did was a violation of the Bank Holding Company Act, nor did we seek recovery for any conduct of his that we claim was any wrongdoing.

THE COURT: All right.

MR. WOOD: Judge Varner, on behalf of the Trustee, this is an Act case, as far as the Trustee is concerned, under the old bankruptcy act.

There were four lawyers appointed for the Trustee at various times during the case. The U.S. Bankruptcy Court here on April the 5th, 1979, determined that Parsons was an involuntary bankrupt and they appointed a lawyer named Farley Moody, they subsequently appointed Jere Beasley — each of these lawyers getting out in turn — George Azar was appointed, and finally I believe along about November of 1979, almost ten months after the state court action was filed, I was appointed to represent the Trustee.

It was the lawyer for the bank who insisted that the Trustee be involved in the state court proceeding. In fact, Your Honor has exhibits 1 and 2 where bank and Herbert used this language: We can't have complete relief unless the Trustee in Bankruptcy, A. Pope Gordon, is added **[53]** to the suit. He claims an interest in it and the bank will be subject to multiple claims if he is not added.

So, we —

THE COURT: Well, you agree with me, don't you, and with him, that a corporation, not a stockholder of the corporation, is damaged by an act against the corporation?

MR. WOOD: That is the law.

THE COURT: And the corporation, not the stockholder, should bring the suit?

MR. WOOD: That is the law.

THE COURT: Now, this suit . . . The water is muddied by the facts that this suit was brought and the damages to the corporation were confused with the damages to the stockholders of the corporation.

MR. WOOD: I dont' believe we have that confusion.

THE COURT: Well, I have a great deal of confusion about it, and still find it quite confusing.

But, go ahead.

MR. WOOD: If Your Honor please, Mr. Nachman —

THE COURT: What I am saying is, that you should have been in it.

MR. WOOD: Well, sir, let's talk about that a minute, Your Honor, because that is the point I want to make.

[54] It was Rod Nachman, the attorney for the bank and the bank and Herbert, who insisted the Trustee be added. And since this was an Act case, it took leave of this Court through its bankruptcy arm for us to pursue that litigation, which was granted. Subsequently, in discussing this with Mr. Nachman — and as an officer of the court, I just tell you this — we were told that this is a very narrow action. This Bank Holding Company action would be a waste of your time and effort, and you shouldn't belong over there. You don't belong over there. We never —

THE COURT: Belong over where?

MR. WOOD: In this court in the Bank Holding Company action.

THE COURT: All right.

MR. WOOD: This lawyer.

I am not saying that strategically he couldn't tell me that, but that was the posture then. The posture now is, "Well, you didn't come over there, so you are out and you are barred."

The bottom line is that, as this Court in exercising its equitable powers looks at this, the bank comes with unclean hands. It does come with unclean hands. They say, "They should have been asked to be added over here." They insisted that we be added over there, put us to the expense of nine days of trial plus months and months and **[55]** months of depositions and preparation, and they tried to say, "Well, we won over in

federal court and you are estopped or you are subject to the rules of res judicata."

Your Honor never saw Count 9 of our Complaint. It is not outlined side by side, but it is before you. I ask you, as you look at those exhibits, to look at the Trustee's cause of action. It is not identical to these folks'. Beasley was not our laboring oar, nor Wilson nor Parsons. The bankruptcy court had already determined that Mr. Beasley could not represent Trustee's interest. He had been their lawyer. It is true we had to use some of the same witnesses because, as Your Honor knows, the witnesses generally are a limited group of people who know what something is about.

The bank comes and asks, Judge Varner, pull our chestnuts out of the fire. We tried over there and we lost." But we were not a party to this federal action. It was a very narrow Bank Holding Company action, as Your Honor knows.

If Parsons did all the things Your Honor said in your order and the Eleventh Circuit agreed with you that he did, but assuming he waived everything, that he did all those things that you found, the Trustee in Bankruptcy, on behalf of the unsecured creditors, would still have a right to insist on a commercially reasonable sale of those **[56]** assets. Our Count 9 asks for that. A jury of twelve people in state court said we are entitled to two million dollars in a general verdict based on that.

Your Honor, we have never had but one bite at the apple, and that was over in state court.

THE COURT: Were you in bankruptcy at the time this suit was originally filed in federal court?

MR. WOOD: No, this suit . . . Yes, sir, we were. Yes, sir.

THE COURT: Do you agree with that?

MR. NACHMAN: Yes, sir.

MR. WILSON: Yes, sir.

THE COURT: All right.

MR. WOOD: But the state court suit was originally filed in February, '79. It was not until April, '79 that the bankruptcy . . . That is an involuntary bankruptcy that Parsons-Montgomery —

THE COURT: Well, I was just wondering why the Bankruptcy Court didn't supervise the sale of assets.

MR. WOOD: The sale had already taken place in January of '79. The bank foreclosed and sold it in January, '79. The involuntary bankruptcy petition was not granted until April of '79.

THE COURT: Well, obviously the Trustee didn't have a right to participate in the sale if there wasn't [57] a Trustee.

MR. WOOD: If it were commercially unreasonable, the Trustee has a right to look back and insist that the bank pay over any value over and above . . . what those assets were worth over and above what they got. And this is what we did in state court. The jury determined we were entitled to two million dollars more than the bank got.

THE COURT: All right.

MR. WOOD: Now, Judge Varner, we have given you a brief. We tell you that we don't believe, under the cases cited, that pendent party jurisdiction was appropriate to this cause of action. You have heard from Mr. Nachman and Mr. Wilson. We cite the Aldinger case, we cite the history of that. We simply say to you that, you know, with twenty-twenty hindsight, a lawyer for the bank comes and says Your Honor would have added these if he had been asked. The record over here in the Bank Holding Company Act is replete, as Mr. Wilson has pointed out, with instances where he was insisting that nobody had a right to be here. And certainly, I think Your Honor . . . If you

would look at Rule 24, you wouldn't have added the Trustee or any of these other folks. That is not a decision you have to make. We just say that pendent party jurisdiction is not appropriate; certainly not [58] against the Trustee.

We were not in privity with the Plaintiffs in the federal action. Mr. Nachman would have you believe that. The federal action that was before Your Honor sought damages for the stockholders of Parsons Steel Industries; not the unsecured creditors of the bankrupt estate.

We were separately representing the Trustee in the state court action, we sought leave to participate over there. Because of the narrow basis for your jurisdiction, we didn't intervene nor try to junk up the federal lawsuit, and we don't think it is res judicata for us. We don't think we could have intervened.

THE COURT: Did some of the obligations of your corporation . . . Were they not endorsed by Mr. or Mrs. Parsons?

MR. WOOD: As far as to the First Alabama Bank, the secured obligations were endorsed. The unsecured creditors I am representing, Your Honor, were mostly open account people like United States Steel and others who had furnished steel and other goods to the company. You know, thirty, sixty, ninety day accounts.

THE COURT: There was at least some privity between the businesses of the Parsons individuals with the businesses of Parsons-Montgomery at that time, then?

MR. WOOD: Well, as Your Honor pointed out to me [59] a while ago — and I agree with Your Honor and certainly with Mr. Nachman — the corporation has the right to pursue the interest that we are talking about. And this corporation, this bankrupt estate, was not in privity with these persons who were over here before you on the Bank Holding Company Act. And that is my point.

THE COURT: If they were liable on the same obligations, it seems to me they were in privity.

MR. WOOD: No, sir, they weren't liable. These were corporate obligations. Parsons had —

THE COURT: But Parsons were liable on some of those corporate obligations, I think.

MR. WOOD: Not on the people I represent. No, sir. They were corporate obligations. He was . . . To my knowledge, there are eight hundred thousand dollars worth of them, plus or minus. But he, to my knowledge, was not giving a limited guarantee or unlimited guarantee or any kind of guarantee to any of these businesses from whom the corporation Parsons-Montgomery bought steel.

Your Honor, there is just simply no basis for applying res judicata or collateral estoppel against this Trustee. As I pointed out, Mr. Nachman comes seeking equitable relief. The bank simply is not entitled to it.

He would have Your Honor look at the portions he has outlined side by side. He conveniently leaves out out **[60]** Complaint, our amended Complaint, in that analysis. We have not had, as I pointed out to Your Honor earlier, but one day in court. And he would seek to have Your Honor take away a fairly won judgment over there, and deny us any bite at the apple.

THE COURT: Now, how did that judgment go over there? Was it a judgment for the Trustee, or was it a judgment for the Parsons, or was it a judgment for Parsons of Mobile, or . . .

MR. WOOD: Let me give it to Your Honor this way: There was a two million dollar judgment for A. Pope Gordon as Trustee. There was a one million dollar judgment for Jim Parsons. There was a one million dollar judgment for Melba Parsons. And there was a one dollar judgment for Parsons, Mobile.

THE COURT: All right.

MR. WOOD: You know, we were there throughout, Your Honor, from November of '79 on. I don't know of any basis . . . As I say, we have given Your Honor in brief the applicable law. I don't know of any basis for this Court to enjoin, exercising its equitable powers, the state court judgment or any proceeding over there as regards this Trustee. We simply haven't been before Your Honor.

As Your Honor recognized a while ago, you did have a bifurcated trial. I was not here, but it is my understand- **[61]** ing that you never got to any damages question. You heard some testimony about the tying arrangement and the basis for the jurisdiction under the Bank Holding Company Act. We heard nine days of testimony . . . eight days of testimony and one day of jury verdict on all aspects of the case; particularly the commercial unreasonableness aspect that the Trustee owned.

We say there is simply no basis for it. Mr. Nachman asks this Court to do something extraordinary when there is no basis for it. His hands are not clean, and he is not entitled to that relief.

MR. NACHMAN: May I respond, Your Honor?

THE COURT: Yes, sir, certainly.

MR. NACHMAN: May it please the Court, I will begin where Mr. Wood ended and take care of the trustees in a hurry.

He stated that he got two million dollars because the sale of assets was commercially unreasonable, and that in my side by side comparison in the exhibit, that is not there. Let me read from page 7 of Exhibit A which is the side-by-side comparison which quotes paragraph 27 of the federal Complaint; the Complaint that was filed before Your Honor.

"The sale of the assets of the subsidiary" — that is, his company; Parsons-Montgomery — "by Defendant O.S.I., **[62]** Incorporated, a corporation newly created in January, 1979, for

the sole purpose of obtaining the assets and properties of the subsidiary, was not handled in a commercially reasonable manner, in that the acquisition and sale of a highly complicated and complex manufacturing firm was completely transacted in less than two days with the price paid by O.S.I. being substantially less than the market value of the assets and properties purported to be sold. In addition thereto, no additional persons or firms who could have been purchasers were given an opportunity to inspect the property and submit bids. Said sale was not handled in conformity with reasonable commercial practices, nor were the property and assets sold for the fair market value thereof." That is the federal Complaint, Your Honor. That is the complaint that began here and ended here with a judgment n.o.v. which dismissed it.

THE COURT: What paragraph is that?

MR. NACHMAN: Paragraph 27 of the federal Complaint. It is quoted . . . Well, the whole Complaint is in evidence, and attached, but it is on page 7, sir, of our side-by-side comparison of the state and federal complaints.

As far as privity is concerned, we don't rely entirely on privity, but I call the Court's attention again to the Southwest Airlines case, the Fifth Circuit case at 546 at page 95, which recites several circumstances in [63] which a party can be bound even though he was not a party to the other action. And one of them is where a parent corporation controls a subsidiary. And there are others that are listed there; trustee represents the interest of the beneficiary, the state can represent the interest of a home-ruled county, the United States government — as I pointed out — was bound by actions of which it was not a party where the party was a public contractor which was resisting the tax.

So, the question, Your Honor, that these lawyers keep avoiding, and in response to questions from the bench, it is not what was actually brought here. It is not whether these plaintiffs

. . . we didn't come into the federal court. We were defendants in this court. We didn't come into the state court. We were defendants in the state court. And the question is not what they actually brought before this Court for decision, but what they could have brought before this Court for decision.

Your Honor asked Mr. Wilson what else was involved. We talked about commercial reasonableness. He mentioned fraud and breach of fiduciary duty.

Well, we have cited on page 13 of our brief three bank holding company cases — Tose against First Pennsylvania Bank . . . all three of these were cited by the Eleventh Circuit when it upheld Your Honor's judgment. In Tose, **[64]** state claims for intentional interference with business under state law were brought along with a complaint in the Bank Holding Company Act. In Duryea against the Third Northwestern National Bank of Minneapolis, state anti-trust law, common law fraud, unjust enrichment, and state blue sky law violations were all alleged in connection with and part of a Bank Holding Company Act case. In Clark against United Bank of Denver, Tenth Circuit case, Bank Holding Company complaint, breach of fiduciary duties, fraud, unfair competition, and breach of warranty.

And the question is not what they actually brought, but what they could have brought. This is clear in so many of these cases. One of the most recent ones is the Harper case, which is — although it is a Seventh Circuit case, Judge Thomas was one of the three judge panel that sat by designation on that case — and there was a failure to join a breach of contract action under state law with a Robinson-Patman Act claim under federal anti-trust law. And the court said, "In the instant case, the issue of whether there was a breach of contract was more than a mere ancillary matter, it was part of the appellant's cause of action. And by failing to raise the matter in his pleading, appellant has split his claim against the appellees."

And then the court goes on, "The rule against claim splitting is not a new one and the cautious litigant includes **[65]** all relevant theories of relief in a single action to avoid its prejudice. The doctrine of pendent jurisdiction and the broad joinder provisions of the Federal Rules of Civil Procedure provide an appellant with a convenient vehicle for presenting the federal court with its several theories of relief. It may not now argue that it has not had an opportunity to do so."

And Your Honor very correctly points out, and Your Honor's findings of fact substantiate what Your Honor said: "The common nucleus of facts, the facts out of which these several theories of relief, these several causes of action arose, were common ones."

We have attached Your Honor's extensive findings in support of your judgment n.o.v. as one of the exhibits to our Complaint. And we will not go through all of those now.

I don't understand Mr. Wilson's argument about how we precipitated a nine day trial in state court. We tried to resist it. We urged over and over again that the case should be thrown out on exactly the basis that we are urging here; that it would be res judicata. And, indeed — to read a very brief excerpt from the minutes of the state court of January 28, 1983 — we even urged the trial court, in order to avoid this trial, to certify this question of res judicata and collateral estoppel to the **[66]** Supreme Court of Alabama. It declined to do so. We asked for a continuance on that basis. Here is what the entry is: "Hearing on Motion for" — this is January 28, 1983, on the literal eve of trial. That was a Saturday before the case began on a Monday — "Hearing on a Motion for Reconsideration and on request to certify res judicata question to appellate court and for a continuance. Motions denied."

Now, the question here on this independent suit for an injunction is quite different as to where we chose to raise this matter and whether we chose to raise it in state court. As I stated in

my opening argument, of course we raised it in state court. It was one of our defenses in the state court just as . . . And had we not raised it, had we not pursued it, had we come here earlier and asked this Court on the . . . As soon as the Court entered its judgment n.o.v., if we had asked this Court to enjoin the state court action, I think our response would have been, "You haven't exhausted your remedies. You may have an adequate remedy at law in the state courts. Am I to assume that the state court will rule adversely to you on that question when you haven't even tried to get a ruling from the state courts?" And I think Your Honor would have balanced the equities and found at that stage that we were not entitled to an injunction.

[67] So, it is not a question of our waiving something by asserting it in the state court. We had to assert it in the state court, but we also had to assert it in state court defenses other than that. We could no more fractionate our defenses in the state court and rely solely on the res judicata defense than these persons can now say the only cause of action they had to raise was the Bank Holding Company Act in the federal court and that they could go into the state court and raise other causes of action arising out of the same facts. We couldn't do that. We had to pursue all of our defenses, and we did. But we urged the Court over and over again to zero in on this one matter and decide it and certify the question to the Supreme Court of Alabama, and it wouldn't do it. And this is why we say it is now necessary, Your Honor, for some protective action.

As far as discovery is concerned, these lawyers know and it is recited in the preamble to deposition after deposition . . . this discovery started before either case was tried, and there are stipulations that discovery was to be in both cases, state and federal, so they wouldn't have to be duplicated. And I don't know what Mr. Wilson was referring to when he talked about our taking discovery in the state court. The same depositions were taken for both courts.

It is a plain case, Your Honor, of re-litigation [68] and of the burdens on the judicial system and, more than that, the integrity of this Court's judgment and jurisdiction.

As the Donnelin case, a Fifth Circuit case — which, as you know, is binding now on the Eleventh Circuit — was cited in our brief on page 18. These persons sought to come into this court. Nobody made them come in here, they came in here. But when they came in here, they had to assert all causes of actions available to them, and they didn't do it. They just asserted one, and they lost here. This Court found that we were not liable, and then they wanted . . . they litigated the others in the state court. We tried our best to prevent that relitigation, and up to now unsuccessfully. And this is, indeed, why it is necessary for this Court to come in.

Now, of course, we can go to the Supreme Court of Alabama. There is no question about that. But what is involved there? The transcript of a nine day trial, bonds, perhaps, to supersede a four million dollar judgment, and the defense against a one hundred nineteen million dollar lawsuit that was just filed a few days ago. And we say that is a harassment, that is a burden of re-litigation which Section 2283 is designed to prevent, and we urge the Court to grant the injunction.

Thank you.

[69] THE COURT: Do either one of you want to comment any further on whether or not . . . Let's assume I may enjoin the present enforcement of the judgment, and I may do that. I can't see the relationship to the further case; the one hundred and some-odd million dollar case. I think that may involve different situations. I don't know, really, what the cause of action is for trying to force a settlement. I thought all lawyers tried to force a settlement. I certainly encourage them to. But I don't know what is involved in it, but if the actions that you are complaining of arise from attempting to improperly force a settlement of a judgment that was outstanding — if there is duress or something

of the sort or something that gives a cause of action — I question that I could enjoin a suit even though it might have arisen from a judgment that I may find was improperly entered by the state court.

MR. NACHMAN: Our theory, Judge, is that the . . . there are numerous allegations in this new state complaint which assert that this state court judgment was obtained by the Parsons and that . . . I don't quite understand the allegations myself. But they are, that in order to induce a settlement of the state action, that we are seeking to have set aside, this bank in illegal conspiracy with the holding company and Merchants National Bank somehow committed **[70]** some illegal acts which were designed to force a settlement at less than what the judgment in Parsons' favor was.

And to that extent, our argument is that since there never should have been that judgement, that res judicata was a defense and that the re-litigated issue which resulted in a judgment which is improper and illegal and should be set aside, that . . . that there never would have been . . . even this fanciful basis for the state court action never would have existed. That is our theory on it.

THE COURT: I am inclined to think that I can't enjoin that proceeding. The other proceeding, I will have to study your exhibits before deciding about it. I am impressed that it is very close to a res judicata situation.

I am not impressed with your argument about their being estopped to raise the res judicata theory.

This is a situation that can be used, I think, with much force to argue against the bare bones pleadings that have been allowed in state and federal courts of late. If you were required to plead your causes of actions specifically and required to set up your damages specifically, we could look at the Complaints and tell whether it was res judicata. There wouldn't have been the necessity for the trial court to go into all of the things . . . I

mean, [71] the state court to go into all of the things they went into in order to decide, finally, the res judicata question. They decided it one way, and I could possibly decide it another.

I remember never really knowing for sure precisely what the charge was in this case until far along in the case. You tried to incorporate a number of wrongs into a Complaint which might have been wrongs and might not have been wrongs, and it was difficult for me to tell whether or not there was. It used to be that there were certain requirement for pleading a particular cause of action, and if the complaint didn't contain those requirements, that was the end of it and it could be dismissed and later re-instituted if you could meet the various requirements. That is no longer the law, and it makes it necessary, sometimes, to actually try a case before you can determine whether a cause of action has actually been stated initially.

That is awfully expensive, and we have reached the stage where the cost of litigation is depriving a lot of people of entrances into courts. Poor people have free access to the courts, the wealthy can afford it, the middle-of-the-roaders really can't afford many court proceedings any more.

As far as your claim of their having waived or [72] being estopped from coming into this Court now, I should much have rather they came at an earlier stage, but I can well understand their situation. Because you were doing your best to state your claim in state court in a way different from the way you stated it in federal court, and I don't blame you for that, but I know you are ingenious lawyers and I know you can do that, and sometimes you have to go through a large part of the trial to see whether you are talking about the same thing.

In any event, I will consider your evidence and your briefs. I haven't read your briefs, though I think I understand the positions you are in.

If I accept Jerry Wood's argument, you have always got a situation where a bankruptcy takes place and somebody is left out of a lawsuit and the bankruptcy could come back and relitigate it later. I find it a little bit difficult to swallow that. I will look into it.

All right. Is there anything else?

MR. NACHMAN: No, sir. Thank you, Judge.

MR. WILSON: No, sir.

MR. WOOD: No, sir.

THE COURT: All right. Court will be in recess until further ordered.

* * *

THIS IS ALL OF THE TESTIMONY IN THIS HEARING.

P L A I N T I F F S '

EXHIBITS

EXHIBITS WITH COURT FILE

FIRST ALABAMA BANK OF MONTG. & EDWARD HERBERT

VS

PARSONS STEEL, INC., ET AL.

} C I V I
} CAUSE
} 83-V-1

Hon. R.E. Varner, presiding

Re: Hearing on Request for Preliminary Injunction

M.R. Nachman, Jr.

MITTED	DATE OFFERED	DATE IDENTIFIED	NO.	WITNESS	OBJECTIONS	DESCRIPTION
		3-17-83	1			Civil case action summary; Case No. 2-CV-79-17 Circuit Court of Montgomery County
		"	2			Court reporter's INDEX of court trial proceedi
		"	3			List of witnesses who testified in state actio
		"	4			Witness list of pltf. A. Pope Gordon, Trustee Bankruptcy for Parsons Steel Industries, Inc.
		"	5			Witness list of pltf. Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons-Cir.Crt.Mtg.Co
		"	6			Witness list of pltfs. Parsons Steel, Inc., et U.S. Dist.Crt.,MD AL CA# 79-249-N
		"	7			Partial court reporter's transcript of opening statements of attorneys at jury trial.
		"	8			Partial court reporter's transcript of closing statements of attorneys at jury trial
		"	9			Copy of summons and complaint in the Cir. Cour of Montgomery Co., Al., CA # 83-304-T

FILED

MAR 17 1983

CLERK
U.S. DIST. COURT
MIDDLE DIST. OF ALA
CLERK, BY

DEFENDANTS' EXHIBITS

FIRST ALABAMA BANK OF MONTGOMERY, N.A., and EDWARD HERBERT

VS

PARSONS STEEL, INC., ET AL.

CIVIL CAUSE NO. 83-V-181-N

FILED

MAR 17 1983

CLERK U.S. DIST. COURT MIDDLE DIST. OF ALA. BY CLERK

Frank Wilson
Jerry Wood

ADMITTED	DATE OFFERED	DATE IDENTIFIED	NO.	WITNESS	OBJECTIONS	DESCRIPTION
		3-17-83	1			re: Cir. Crt. of Montg. Co., CA CV-79-179-G 1st Ala.'s renewed mot. to dism. amended complain
		"	2			re: Cir. Crt. of Montg. Co., CA CV-79-179-G Ed Herbert's renewed mot. to dism. amended compla
		"	3			re: Cir. Crt. of Montg. Co., CA CV-79-179-G ORDER of Wm. Gordon, dated 12-12-79
		"	4			re: Cir. Crt. 15th Judicial Cir. CV-79-179-G ORDER denying summary judgment 3-17-82
		"	5			re: CV-79-179-G, 1st Ala.'s and Ed Herbert's m/strike or answer to 2nd amendment to complaint
		"	6			re: CV-79-179-G, 1st. Ala. Bank's notice of intent to serve subpoena on non-party
		"	7			re: CV-79-179-G, 1st Ala.'s and Ed Herbert's request for production of documents
		"	8			re: CV-79-179-T ORDER of court on summary judgment, 1-6-83
		"	9			re: CV-79-179-T, Contentions of deft. 1st Ala. Bank and Edward Herbert
		"	10			re: CV 79-179-T, Contentions of Parsons Steel, In Jim D. Parsons and Melba L. Parsons
		"	11			re: CV 79-179-G, Mot. of 1st Ala. Bank & Herbert for reconsideration of mot. for summary judgment
		"	12			re: CV 79-179-G, List of documents for trial on behalf of 1st Ala. Bank and Edward Herbert
		"	13			re: CV 79-179-G, 1st Ala. and Herbert's alternative mot. to reconsider or continue
		"	14			re: CV 79-179-G, 1st Ala. and Herbert's CROSSCLA against OSI, INC. and Michael Orange
		"	15			re: CV 78-179-G, 1st Ala. and Herbert's renewed mot. for summary judgment
		"	16			CA CV 79-179-G, Bank & Herbert's objection to dismissal
		"	17			re: CV 78-179-G, 1st Ala. Bank's 2nd amendment to answer
		"	18			re: CV 78-179-G, Herbert's 2nd amendment to answer

DEFENDANTS'

EXHIBITS

PAGE 2

FIRST ALABAMA BANK OF MONTGOMERY, N.A., and EDWARD HERBERT

VS

PARSONS STEEL, INC., ET AL.

CIVIL CAUSE NO. 83-V-18

FILED

MAR 17 1983

CLERK
U.S. DIST. COURT
MIDDLE DIST. OF ALA
CLERK, BY

ADMITTED	DATE OFFERED	DATE IDENTIFIED	NO.	WITNESS	OBJECTIONS	DESCRIPTION
		3-17-83	19			re: Cir. Crt. of Montg. Co., CV 79-179-G Answer of 1st Ala. Bank of Montgomery
		"	20			re: Cir. Court of Montg. Co., CV 79-179-T ORDER of Sam Taylor, 1-31-83
		"	21			re: Cir. Crt. of Montg. Co., CV 79-179-G Defts.' proposed voir dire of the jury venire
		"	22			re: CV 79-179-T Court's formal minute entry of jury verdict

PLAINTIFF'S EXHIBIT 1

State of Alab... Supreme Cou... Dept. of Coun...

Form SC-CSA 1...

CIVIL CASE ACTION SUMMARY

Case Number 2-CV-79-179-[illegible]
ID YR Number

IN THE Circuit COURT OF Montgomery COUNTY

ORI 003045 | Case Number 2-CV-79-179-[illegible] (ID YR NUMBER)

Plaintiff's Name	Defendant's Name	Plaintiff's Attorneys
Parsons Steel Industries, Inc., Parsons Steel, Inc., Jim D. Parsons, and Melba L. Parsons; A. Doyle Bearden as Trustee for Parsons Steel Industries, Inc. (1-12-79)	First Alabama Bank of Montgomery, N. A., Edward Herbert, OSI, Inc., and Michael Orange	Jere L. Beasley Tom DeBuys for Trustee in Bankruptcy Defendant's Attorneys Jim Upchurch Alinda Jones Lee - Defts. OSI and Michael Orange M.X. Sachman, Jr. & Eric Rumpf for First Ala. Bank and Edward Herbert Third Party Attorneys

FILING DATE	DATE SVC	EFF
2 1 5 7 9		

CASE TYPE: Damages

AMOUNT: $ 12,384,945,89

JURY: YES X

PLAINT INDIG: YES —

Disposition

Disposition Date

ACTIONS Jan 21, 1983 9:00 AM

Date	
2/15/79	Summons and Complaint Filed and Issued Sheriff Montgomery County for Service on all Defts.
2-15-79	Served Mr. Cox for First Ala Bank, Edward Herbert, OSI Inc and Michael Orange
3-14-79	Motion to Dismiss filed by defts. OSI
3-14-79	Motion to Dismiss filed by Michael Orange
3-15-79	Motion to Dismiss filed by defts Edward Herbert Motion to Dismiss filed by First Ala Bank
3-16-79	Order setting hearing on Motion at 1:00 p.m. on March 23, 1979
3-22-79	Order setting hearing on motion on April 10, 79 at 8:30 A.M.
3-29-79	Motion for Production of Documents directed to First Ala. Bank of Montgomery and Edward Herbert filed by pltf.
3-29-79	Motion for Production of Documents directed to defts. OSI and Michael Orange filed by pltf.

COURT RECORD (White)

Date	ACTIONS
4-9-79	Motion to produce under Rule 34, Alabama Rules of Civil Procedure filed.
✓	Motion to shorten time filed.
4-20-79	Response to motion for Production of Documents of Defts First Alabama Bank of Montgomery, N.A., and Herbert filed
4-26-79	Amendment to Complaint filed
5-2-79	Motion to Dismiss amended complaint of deft. Herbert filed.
5-2-79	Motion to Dismiss Amended Complaint of Deft. First Ala Bank filed.
9-26-79	Notice of taking depositions of Michael Orange filed
10-18-79	Order setting scheduling conference at 1:30 p.m. on Nov. 16, 1979
10-24-79	Response of Pltf to motion to dismiss Amended Complaint of Defendant Herbert
✓	Response of Pltf to motion to dismiss Amended Complaint of Deft. First Alabama Bank of Montgomery, N.A.
10-30-79	Order setting Hearing for Nov. 6, 1979 on pending motion to Dismiss Amended Complaint filed.
11-7-79	Scheduling Conference Order filed
11-21-79	Notice to take Deposition of Michael Orange on Dec. 4, 1979, at 9:00 AM filed by pltf.
11-29-79	Notice to take depositions filed
11-29-79	Civil Subp. filed & issued to Mr. William E. Epperson Ex 11-30-79
✓	Civil Subp. filed & issued to Mr. Mark Plummer Ex 11-30-79
✓	Civil Subp. filed & issued to Mr. George Beckwith Ex 11-30-79
11-29-79	Civil Subp. filed & issued to Mr. William B. Hobbs Ex 11-30-79
✓	Civil Subp. filed & issued to Mr. Cecil Brightwell Ex 11-30-79

State of Alabama
Supreme Court
Dept. of Court Mgmt.
Form SC-C-7 11-77

CASE ACTION SUMMARY
CONTINUATION

Case Number
CV 79-179-S
ID YR Number

Page Number 2

DATE	ACTIONS
11-29-79	Civil Subp Iss'd & issued to Mr Charles Hines Ex 11-30-79
✓	Civil Subp Iss'd & issued to Mr Allen Reynolds Ex 11-30-79
✓	Civil Subp Iss'd & issued to Mr Thomas R. Peacock Ex: 11-30-79
✓	Civil Subp Iss'd & issued to Mr. Paul E. Norris Ex 11-30-79
✓	Civil Subp Iss'd & issued to Mr. James S. Haskell, Jr. Ex 11-30-79
12-12-79	Interrogatories to defendant, First Alabama Bk Iss'd.
12-12-79	The Court having read and considered the renewed motion to dismiss filed by Defendant First Alabama Bank of Montgomery, N.A., it is ORDERED that the trustee in bankruptcy for Parson Steel Industries, A. Pope Gordon, be joined as a party plaintiff to this action and that a copy of this Order be mailed to the trustee and his counsel, Honorable James Jerry Wood. It is further ORDERED that the renewed motion to dismiss is in all other respects due to be, and the same is, hereby DENIED. s/William R. Gordon Circuit Judge
12-14-79	Order for U.S Bankruptcy Court -
12-17-79	Notice to take Deposition on December 26, 1979 at 9:00 a.m.
12-17-79	Civil subpoena Iss'd & issued to George Goodwyn Ex: 12-21-79
✓	Civil subpoena Iss'd & issued to William B Gordon Ex: 12-19-79
✓	Civil subpoena Iss'd & issued to Charles Brightwell Ex 12-19-79
✓	Civil subpoena Iss'd & issued to James S. Haskell Jr Ex 12-19-79
✓	Civil subpoena Iss'd & issued to Paul E Norris Ex 12-19-79
✓	Civil subpoena Iss'd & issued to Thomas R Peacock Ex 12-19
✓	Civil subpoena Iss'd & issued to Allen Reynolds Ex: 12-19-79
✓	Civil subpoena Iss'd & issued to William E. Upton Ex: 12-19-
✓	Civil subpoena Iss'd & issued to Mr. Frank Pleasant Ex: 12-19-
✓	Civil subpoena Iss'd & issued to Mr. Charles Hines Ex: 12-19-79
✓	Civil subpoena Iss'd & issued to Howard Kaufman Ex: 12-19-79

COURT RECORD (rev. 1/81)

Date	ACTIONS
12-17-79	Civil subpoena (ft x issued Luther W. Waller) Ex: 12-19-79
12-28-79	Motion to Extend time for Discovery filed by pltf.
1-8-80	Order granting motion to extend time for discovery filed by pltf.
1-9-80	Mem. to pltfs Interrs filed by Dfft. Ft Okla. Bank
1-10-80	Notice to take) deposition) on January 24, 1980 at 9:00 a.m.
1/15/80	Notice to take deposition of Luther Waller, Samuel Kaufman & Wm M Richardson fld
1/15/80	Civil subpoena dt issd to Samuel Kaufman Ex 1-17-80
1/15/80	" " " " to Luther Waller Ex 1-17-80
1/16/80	" " " " Wm M Richardson Ex 1-17-80
1-16-80	Notice to take deposition of Cecil Thompson and Don Webber
1-23-80	Ordered that the discovery cut-off date is extended through Friday, ~~February~~ February 29, 1980
2-13-80	Notice to take deposition of Mrs. Nelba Parsons and Mr. James D. Parsons fld
4-18-80	Motion for Summary Judgment of Dfft. Edward Herbert fld
4/23/80	Order setting hearing on dfft. Edward Herbert's motion for summary judgment at 2:30 p.m. on May 16, 1980
4/25/80	Order setting hearing on dfft. Edward Herbert's motion for summary judgment at 9:00 a.m. on May 27, 1980
5/7/80	Supplemental Pages 147-169 to Exhibit B to Dfts. Bank & Herbert's motions for summary judgment fld.
5-12-80	Memorandum) Brief in Support of motion) for Summary judgment & Exhibits) Exhibit A - Pltf dep. p. 1 thru

State of Alabama
Unified Judicial System
Form C-7 Rev. 2/79

CASE ACTION SUMMARY
CONTINUATION

Case Number 7
CV-79-179-L
ID YR Number

Style:

Page Number 3 of ____ Pages

DATE	ACTIONS, JUDGMENTS, CASE NOTES
5-16-80	Motion for Summary Judgment by deft OSI Inc. and Michael Orange filed.
5-27-80	Matters in opposition to Defts. First Ala Bank Ed Herbert and Michael Orange's Motions for Summary Judgment fld. w/affidavits, depositions and Exhibits listed (Depositions & Exhibits in Clerk's filing Cabinet)
5-28-80	Motion to Strike Affidavit fld by Defts. First Ala. Bank & Atty and Edward Herbert.
5-28-80	Deposition of Melba Parsons filed.
5-30-80	Memo Brief in opposition to Defts Motion to Strike Affidavits fld by deft.
6-18-80	Reply brief in support by deft. Motions for Summary Judg fld.
7-8-81	Motion for Recusal filed by Pltfs.
7-13-81	Order setting hearing on Pltfs motion for recusal at 2:00 p.m. on July 22, 1981
8/31/81	Order denying Plaintiffs motion for recusal
10/23/81	motion to set trial date filed by pltff.
10/23/81	Order setting sch. Conf for Nov 12, 1981 at 2:30pm held.
11-3-81	Supplementation to Motion for Summary Judgment of deft. Edward Herbert w/Exhibits filed.
11-3-81	Supplementation to Motion for Summary Judgment of deft. First Ala. Bank & Ala.

Date	ACTIONS, JUDGMENTS, CASE NOTES
	w/ Exhibits & seal -
11/1/81	Response of Plff, Response to Dfts to Supplementation of their respective Motions for summary Judgment
11/23/81	~~Motion~~ filed in opposition to Dfts' Motion for summary Judgment filed by Plff.
11/12/81	Ordered that Motions for summary judgment are scheduled to be heard on Nov. 24, 1981 at 1:30 p.m.
3-17-82	Order denying Motion(s) for Summary Judgment filed
3/22/82	Order setting Pre-trial Conf. for April 2, 1982 @ 2:00 P.M.
3/25/82	Answer & Third Ala. Bank of Montgomery, N.A. filed w/ Counterclaim
3/25/82	" " Edward Hulsey, Defs. filed.
4/6/82	Scheduling Conference order for Pretrial Conference on August 27, 1982 at 10:00 a.m. Trial set for October 4, 1982 at 10:00 a.m.
4/27/82	Answer of Plffs Parsons Steel Inc, Jim D. Parsons and Melba L. Parsons to Dft Third Alabama Bank's Third Counterclaim filed
4/27/82	Answer of Plffs Parsons Steel Inc, Jim D. Parsons & Melba L. Parsons to Dft Third Alabama Bank's Second Counterclaim filed
4/30/82	Interrogatories to Dfts. Third Ala. Bank filed by Plffs.
5/24/82	Order filed setting Hearing on Plff's Motion for Summary Judgment for July 14, 1982 @ 10:00 A.M.
5/27/82	Request for Supplementation of Prior Responses filed by Plffs.
5/27/82	Dfts OSI, Inc and Dft Michael Orange's response to "Request for Supplementation of Prior Responses" filed
5/21/82	Answers of Dft First Alabama Bank of Montgomery, N.A. to Plffs Interrogatories filed.
6/2/82	Plff's Brief in support of Motion for summary Judgt. filed.
6/14/82	Amendment to Complaint filed by Plff

State of Alabama
Unified Judicial System
Form C-7 Rev. 2/79

CASE ACTION SUMMARY
CONTINUATION

Case Number 7
CV 79 179
ID YR Number

Style:

Page Number 4 of ____ Pages

DATE	ACTIONS, JUDGMENTS, CASE NOTES
6/15/82	Request for Production to Defts Michael Orange and OST Inc. fld by Pltfs.
6/15/82	Interrogatories to Defts Orange and OST Inc fld by Pltfs
6/16/82	Motion to Strike, Or in the Alternative, to Dismiss Trustee's Amendment to Complaint fld by Defts, First Ala. Bank & Edward Herbert.
6/16/82	Notice of Pltfs Intention to Serve a Subpoena Pursuant to Rule 34(c)(2) on Non-Party Malcolm Humphreys upon expiration of 15 days (Issue July 2)
6/17/82	Second Amendment to Complaint by Pltfs Parsons Steel Inc, Jim D. Parsons & Nelda L. Parsons fld
6/21/82	Order fld. setting hearing on Defts 1st Ala. Bank) & Mitzy and Edward Herbert's Motion to Strike for July 9, 1982 @ 2:30 P.M.
6/22/82	Motion to Strike, or in the Alternative Answer to second Amendment to Complaint fld by Defts First Alabama Bank & Edward Herbert
6/22/82	Response of Defts First Alabama Bank of Monty, NA and Edward Herbert to Pltfs' Request for Supplementation of Prior Responses fld
6/23/82	Motion to Compel fld by Pltfs.
6/28/82	Order fld setting hearing on Defts Motion to Strike on July 9, 1982 at 2:30 p.m.
7/2/82	Cert. Subpoena for Prod. of Doc., etc. (Non-Party) fld. & issued Fax service to Sheriff, Autauga County for Service on Malcolm Humphreys.

Date	ACTIONS, JUDGMENTS, CASE NOTES
7/9/82	Materials in Support of Motion to Strike Or, in the Alternative, to Dismiss Trustee's Amendment to Complaint fld. by Defts
7/5/82	Response of Trustee to Defts Motion to Strike or in the Alternative Motion to Dismiss fld by Attys. Hon. A. Agee Gordon
7/6/82	Issued Subp. Jas Prod. on Rem - Party Malcolm Humphries
7/22/82	Request for Production of Documents fld. by Defts First Ala Bank of Bitzmy & Edward Herbert
7/22/82	Motion for Default Judgment Against Defts OST Inc & Michael Orange by Pltf's Parsons Steel Inc, Jim D Parsons & Melba L Parsons fld
7/22/82	Motion to Compel fld by Parsons Steel, Inc
7/23/82	Answer of Defts Michael Orange and OST, Inc to Complaint as amended fld.
7/26/82	Show Cause Order fld
7/27/82	Withdrawal of Motion for Default Judgment fld by Pltf's
7/29/82	Ans. of Michael Orange & OSI, Inc. to Interrogatories Served on June 15th fld.
7/29/82	Responses of Defts Michael Orange & OSI, Inc. to Request for Production Served on June 15th.
8/6/82	Notice of Intent to Serve Subp on Non Party Merchants National Bank upon expiration of 15 days fld. by Defts First Ala. Bank of Bitzmy. (Same Eng. 23rd)
8/12/82	Motion to Compel Response to Request for Production fld by Pltf's
8/16/82	Witness List of Defts First Alabama Bank of Montgomery and Edward L. Herbert fld.
8/16/82	Pltf's Parsons Steel Inc., Jim D. Parsons & Melba L. Parsons Witness List fld (Amended)

State of Alabama
Unified Judicial System
Form C-7 Rev. 2/79

CASE ACTION SUMMARY
CONTINUATION

Case Number
CV- 79- 179.6
ID YR Number

Style:

Page Number 5 of ____ Pages

DATE	ACTIONS, JUDGMENTS, CASE NOTES
8/17/82	Request for Prod. to Defts. Michael Orange & OSI, Inc. Fld by Pltfs.
8/18/82	Witness List of Pltf C. Pope Burden, Trustee in Bankruptcy for Parsons Steel Industries, Inc. fld
8/18/82	Motion to Compel Production by Defts Michael Orange & OSI, Inc fld by Pltfs.
8/19/82	Motion to Compel Production filed by Pltfs Request for Production Fld. by Pltfs.
8/19/82	Motion in Limine fld by Pltfs.
8/20/82	Motion for Summary Judgment by Orange & OSI, Inc, fld.
8/22/82	CV. Subp. for Prod. of Doc. Under Rule 34 (b)(2) fld & issued by Defts, 1st Nat. Bk. of Mtgy for service by Sheriff, Mobile Co. to Merchants National Bank
8/27/82	Order filed, Judge Gordon recuse. Reassigned to Judge Taylor
8/31/82	Order setting sched Conf for September 30, 1982 at 2:15 P.M.
8/26/82	Motion for Counsel to be Served Granted. Subp. (Dt) to Merchants National Bank, % E. Creel, Sec.
9-30-82	Scheduling conference. Trial date Jan. 31 1983. Pretrial conference set Jan. 4, 1983 - 9:00
10/12/82	Brief & Materials in Support of Bank & Herbert's Renewed Motion for Summary Judgment fld.
14 Oct '82	Hearing on all pending motions.
1/3/83	Witness List of Defts, First Ala. Bank of Mtgy N.A. & Edward Herbert fld.

Date	ACTIONS, JUDGMENTS, CASE NOTES
1/6/83	Order of Court Compelling Production by Defts. Michael Deaver & OSI Fld.
1/6/83	Order on Plff's Motion to Compel to Defts First Ala. Bank of Pitts., N.A. & Edward Herbert Fld.
1/6/83	Order Fld. Denying Defts' Motion for Summary Judgment
1/7/83	Motion to Dismiss Fld by Defts.
12 Jan 83	Hearing on Motion in Limine.
1/13/83	Order Fld. Denying Defts' Motions to Dismiss as to Plff by Alternative Motions to Strike
1/13/83	Order Fld Granting Motion for Leave to File by A. Pope Gardner, Trustee in Bankruptcy of Plff
1-19-83	Motion of Defts. 1st Ala Bank and Herbert, for Reconsideration of their Motions and Renewed motion for Summary Judgment filed
1-18-83	Contentions of Defts First Ala. Bank of Montgomery, N.A. and Edward Herbert fld
~	Motion for Reconsideration fld by Plffs Parsons Steel and Jim D. Parsons & Nelda L. Parsons
1/20/83	Motion for Summary Judgment of Plff, A. Pope Gardner, Trustee in Bankruptcy
1/19/83	Contentions of Parsons Steel, Inc., Jim D. Parsons & Nelda L. Parsons fld
1/21/83	Order on Motion for Reconsideration of their Motion and Renewed Motion for Summary Judgment fld
1/27/83	ORDERED that Motion in Limine of the Plaintiff is hereby denied, the court is of the general impression that the issue of res judicata is an issue properly to be decided by the Court rather than an issue to be presented to and decided by the jury. This proposition would be especially true where, as in the instant case, the factual issues have been fully presented to the Court in the course of Motions to Dismiss, Motions for Summary Judgment and Motion for Reconsideration of Motion for Summary Judgment and that the facts as regards th

State of Alabama
Unified Judicial System
Form C-7 Rev. 2/79

CASE ACTION SUMMARY
CONTINUATION

Case Number
CV-79-179 T
ID YR Number

Style:

DATE	ACTIONS, JUDGMENTS, CASE NOTES
	issue of res judicata are clearly undisputed.
	DONE this the 27th day of January, 1983.
	/s/Sam W. Taylor Circuit Judge
1-24-83	ORDERED that Plaintiff's Motion for Reconsideration of this Court's order denying Plaintiffs' Motion for Summary Judgment on Defendant First Alabama Bank's counterclaims is hereby GRANTED. The Court having reconsidered Plaintiffs' Motion for Summary Judgment on Defendant First Alabama Bank's counterclaims it is hereby ORDERED, ADJUDGED and DECREED that said Motion for Summary Judgment be GRANTED. Defendants first and second counterclaims are hereby dismissed. ORDERED, ADJUDGED and DECREED that Defendants First Alabama Bank and Herbert Motion for Reconsideration of their Motion and renewed Motion for Summary Judgment is Hereby DENIED. ORDERED, ADJUDGED and DECREED that the Motion of Defendants Orange and OSI, Inc. for Reconsideration of their Motion an renewed Motion for Summary Judgment is hereby DENIED.
	/s/Sam W. Taylor Circuit Judge
1-27-83 1-28-83	List of documents filed - Plaintiffs Alternative Motion for Reconsideration filed by defts
28 Jan 83	Hearing on Motion for reconsideration of MSJ and on request to certify res judicata question to appellate court and on motion for continuance. Motion denied. 4-Judge Ct. V.
1/28/83	Cross-claim of defts Band and Herbert against OSI and Michael Orange filed.
1/31/83	Ordered, Adjudged and Decreed that said Crossclaim of defendants Band and Herbert against OSI, Inc. and Michael Orange is hereby severed.
	Done this 31st day of January, 1983.
	/s/ Sam W. Taylor, Judge
1/28/83	Renewed Motion for Summary Judg. of Defts. Bank and Herbert filed.
1/31/83	Ordered, Adjudged and Decreed that defendants, Bank and Herbert Renewed Motion for Summary Judgment is hereby Denied.
	Done this the 31st day of January, 1983.
1-28-83. 1-27-83.	Second Amend. to Cross. of Herbert filed - /s/ Sam W. Taylor, Judge. Second Amend. to Cross. of Band et. Band
1/28/83	Objection of Bank and Herbert to Dismissal filed
1/31/83	Stipulation of Dismissal as to Michael Orange and OSI, Inc. filed.
1/31/83	Pro Tanto Release and Settlement Agreement filed.

Forward

Date	ACTIONS, JUDGMENTS, CASE NOTES
1-31-83	Requested Chgang 1st ala Bank and Herbert filed.
	Numerous other motions filed or received in ex ct; all proposed, motions
Jan 31, 1983	Jury trial This date; 2-1-83 - order to file jury charges
Feb 1, 1983	Continuing This date
2	" " "
3	" " "
4	" " "
7	" " "
8	" " "
9	" " " resulting in verdicts by jury
	in favor of A. Pope Gordon as trustee for Persons Steel
	Industries, Inc. for $2,000,000.00; in favor of Persons
	Steel Inc. for $1/2¢; in favor of Jim D. Persons for
	$1,000,000.00; in favor of Melba L. Persons for $1, as to
9 Feb '83	Judgment entered in accordance with verdicts
	Misc 1983-M 101 L. Ray Cox, J.
2/3/83	Motion for Directed verdict of 1st ala Bank filed as qu-
2/14/83	Motion Court for Summary Judgment, or in the Alternative
	Motion to Strike or to dismiss Crossclaim filed by
	Cross-Def Michael Grange.
2-3-83	Motion for Directed verdict of Edward Herbert filed
	in open Court
2-7-83	Memo of Law in support of Def Trustee's Motion
	for Directed verdict filed in open Court.
2-7-83	Motion for Partial Directed verdict filed by
	Def. Trustee against 1st ala Bank in open Court
2/24/83	Alternative Motion for new trial of First Alabama
	Bank of Montgomery, N.A. filed.
2/24/83	Alternative Motion for new trial of Edward Herbert.
	filed

State of Alabama
Unified Judicial System
Form C-7 Rev. 2/79

CASE ACTION SUMMARY
CONTINUATION

Case Number
CV-79-179-J
ID YR Number

Style:

Page Number 7 of ____ Pages

DATE	ACTIONS, JUDGMENTS, CASE NOTES
2/24/83	Motion For Judgment Notwithstanding The Verdict
	Of Deft, First Alabama Bank of Montgomery N.A. Fld.
2/24/83	Motion For Judgment Notwithstanding the Verdict
	of Deft Edward Hubert Fld
3/7/83	Motion For Stay Fld by Defts

STATE OF ALABAMA
MONTGOMERY COUNTY Debra P. Hackett

I, ~~Pauline C. Eubanks~~, Clerk of the Circuit Court of Montgomery County, hereby certify that the within is a true and correct copy of the ~~Case Action Summary~~ Docket CV-79-179. on file in said office.

~~Witness my hand and the seal of said~~ Court is hereto affixed, this the 11th day of March 19 83

Debra P. Hackett
Clerk Circuit Court

Date	ACTIONS, JUDGMENTS, CASE NOTES
1-21-83	Requested Charge of 1st ala Bank and Herbert filed.
	Witnesses & Motions filed or received in court all previously noted
Jan 31, 1983	Jury trial This date; 2-1-83 - order to file jury charges
Feb 1, 1983	Continuing This date
2	" " "
3	" " "
4	" " "
7	" " "
8	" " "
9	" " " resulting in verdict by jury
	in favor of A. Pope Gordon as trustee for Pressed Steel
	Industries Inc. for $2,000,000.00; in favor of Pressed
	Steel Inc. for $1.00; in favor of Jim D. Parsons for
	$1,000,000.00; in favor of Melba L. Parsons for $1.00 w.s.
9 Feb '83	Judgment entered in accordance with verdicts.
	Min Bk 3 - P 101 S. Pugh J.
2/3/83	Motion for Directed verdict of 1st ala Bank filed in open
2/14/83	Motion for Summary Judgment or in the Alternative
	Motion to Strike or to dismiss Crossclaim filed by
	Cross Def Michael Grange.
2-3-83	motion for directed verdict of Edward Herbert filed
	in open court
2-7-83	Opinion of Law in support of Jeff Lunsford's Motion
	for Directed verdict filed in open Court.
2-7-83	motion for Partial Directed verdict filed by
	Jeff. Lunsford against 1st ala Bank in open Court
2/24/83	Alternative Motion for new trial of First Alabama
	Bank of Montgomery, N.A. filed.
2/24/83	Alternative Motion for new trial of Edward Herbert.
	filed

I N D E X
(VOLUME 1)

	Page No.
Opening Charge of the Court	2
Opening Statement of Mr. Beasley	20
Opening Statement of Mr. Nachman	35
Witnesses for Plaintiff:	
Carl Martin	
Direct by Mr. Wilson	53
Cross by Mr. Nachman	57
Edmond W. Hodge	
Direct by Mr. Beasley	58
Voir dire by Mr. Nachman	80
Direct (Resumed) by Mr. Beasley	81
Cross by Mr. Nachman	91
Melba Parsons	
Direct by Mr. Wilson	97
Cross by Mr. Nachman	101
Charles M. Hines	
Direct by Mr. Beasley	105
Cross by Mr. Nachman	138
Redirect by Mr. Beasley	145
Recross by Mr. Nachman	151
James S. Gaskell, Jr.	
Direct by Mr. Beasley	153
Cross by Mr. Nachman	202
Redirect by Mr. Beasley	222
(VOLUME 2)	
James Larry Whitehead	
Direct by Mr. Beasley	226
Cross by Mr. Nachman	234
J. Allen Reynolds, Jr.	
Direct by Mr. Wilson	238
George Thomas Goodwyn	
Direct by Mr. Wilson	251

PLAINTIFF'S EXHIBIT 2

INDEX - Page 2

VOLUME 2 - continued)

****

	Page Nos.
Testimony from depositions:	
William M. Jordan	255
Charles P. Brightwell	261

****

Jimmy Douglas Parsons	
Direct by Mr. Beasley	268
Direct (resumed) by Mr. Beasley	315
Cross by Mr. Nachman	339
Jimmy Douglas Parsons	
Cross (Resumed) by Nachman	450
Redirect by Mr. Beasley	454

VOLUME 3

Robert Dense	
Direct by Mr. Beasley	458
Voir dire by Mr. Nachman	465
Direct (Resumed) by Mr. Beasley	466
Cross by Mr. Nachman	471
Redirect by Mr. Beasley	479
June Williams	
Direct by Mr. Wilson	480
Cross by Mr. Nachman	491
Voir dire by Mr. Wilson	505
Cross (Resumed) by Mr. Nachman	506
Redirect by Mr. Wilson	507
Louie H. Moore	
Direct by Mr. Beasley	510
Cross by Mr. Nachman	512
Redirect by Mr. Beasley	515
Recross by Mr. Nachman	516

WITNESSES FOR DEFENDANT:	Page No.
Wm. M. Richardson, Jr.	
Direct by Mr. Nachman	538
Cross by Mr. Beasley	553
Redirect by Mr. Nachman	568
Recross by Mr. Beasley	571

INDEX - Page 3

VOLUME 3 (continued)

	Page Nos.
Samuel Kaufman	
Direct by Mr. Nachman	572
Cross by Mr. Beasley	597
Redirect by Mr. Nachman	613
Recross by Mr. Beasley	614
Luther Hill Waller , Jr.	
Direct by Mr. Nachman	626
Cross by Mr. Beasley	637
Redirect by Mr. Nachman	656
Lannie Crane	
Direct by Mr. Nachman	661
Voir dire by Mr. Wilson	664
- - - - - - - - - -	
(Hearing out of presence of Jury as follows:)	
Edward Herbert	
Voir dire by Mr. Wilson	677
- - - - - - - - - -	
Lannie Crane	
Voir dire (resumed)by Mr. Wilson)	686
VOLUME 4	
Lonnie Crane	
Direct (Resumed) by Mr. Nachman	692
Cross by Mr. Wilson	716
Michael Orange	
Direct by Mr.Nachman	741
- - - - - - - -	
(Testimony - deposition - taken out of presence of the Jury)	
Lannie Crane	
Cross by Mr. Nachman	770
- - - - - - - -	
Michael Orange	
Direct (Resumed) by Mr. Nachman	775
Cross by Mr. Beasley	819
Redirect by Mr. Nachman	852

WITNESSES WHO TESTIFIED IN STATE ACTION

For Plaintiffs:

Edmond W. Hodge
Charles M. Hines
James S. Gaskell, Jr.
James Larry Whitehead
A. Pope Gordon
Tim Hill
Joel Buchanan
Jim D. Parsons
Larson Edge
June N. Williams
Melba L. Parsons

For Defendants:

Paul Corwin
William M. Richardson
Henry Hardegree
John DeLoach
Luther Hill Waller, Jr.
Lanny Crane
Samuel Kaufman
Michael Orange
Edward Herbert

INDEX - Page 4

VOLUME 4 (continued)

	Page Nos.
Depositions read into evidence:	
John A. MacDonald	
Direct by Mr. Beasley	854
Cross by Mr. Nachman	857
Ronald Gordon Myers	
Direct by Mr. Beasley	864
Edward Herbert	
Direct by Mr. Nachman	878
VOLUME 5	
Edward Herbert	
Cross by Mr. Beasley	907
Redirect by Mr. Nachman	931
Recross byMr. Beasley	939
Closing Arguments:	
By Mr. Beasley	954
By Mr. Nachman	969
By Mr. Beasley	988
Court's Oral Charge	997

Plaintiff's Exhibit 4

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA
No. CV-79-179-G
[Caption Omitted]

WITNESS LIST OF PLAINTIFF A. POPE GORDON, TRUSTEE IN BANKRUPTCY FOR PARSONS STEEL INDUSTRIES, INC.

Plaintiff A. Pope Gordon, Trustee in Bankruptcy for Parsons Steel Industries, Inc., reserves the right to call the following witnesses at trial:

1. Any persons whose depositions have been taken in the following litigation:

(a) *Parsons Steel Industries, Inc. v. Pollution Control Walther, Inc.*, CV-77-02529, Jefferson County Circuit Court

(b) IN RE: Parsons Steel Industries, Inc.
Honorable A. Pope Gordon v. Parsons Steel Industries, Inc., U. S. Bankruptcy Court, 79-173-N

(c) *Parsons Steel Industries, Inc. v. First Alabama Bank of Montgomery,* U.S. District Court, Middle District of Alabama, 79-249-N

2. Any persons who have offered testimony in the above-named cases.

3. Any witnesses listed by Defendants or Co-Plaintiffs Jim Parsons, Melba Parsons and Parsons Steel Industries, Inc.

4. Any witnesses whose identities or necessity is learned through outstanding discovery.

/s/ Thomas R. Debray
Attorney for Trustee

Plaintiff's Exhibit 5

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

PLAINTIFFS PARSONS STEEL, INC., JIM D. PARSONS AND MELBA L. PARSONS' WITNESS LIST

Plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons expect to call as witnesses at the trial of the above-styled case the following individuals:

1. Edward Herbert
First Alabama Bank
8 Commerce Street
Montgomery, Alabama

2. Reggie Coon
Reynolds Aluminum
4500 5th Avenue South
Birmingham, AL 35222

3. James S. Gaskell, Jr.
First Alabama Bank
8 Commerce Street
Montgomery, Alabama

4. J. Allen Reynolds
First Alabama Bank
Commerce Street
Montgomery, Alabama

5. Larsen Edge
405 #1 Office Park
Mobile, AL

6. Michael Orange OSI Inc
4110 Birmingham Hwy.
Montgomery, Alabama

7. Luther Waller
One Court Square
Montgomery, Alabama

8. William Richardson
First Montgomery Bank
348 Montgomery Street
Montgomery, Alabama

9. Charles M. Hines
3804 Governors Drive
Montgomery, Alabama

10. Russell Chatelain
Avondale Shipyards
New Orleans, LA

11. Bill Burk
U. S. Steel
P. O. Box 599
Fairfield, Alabama

12. Harry Levowitz
Alabama Steel Supply
Montgomery, Alabama

13. John Bear
Gamble Steel
Montgomery, Alabama

14. Samuel Kaufman
One Court Square
Montgomery, Alabama

15. Randy S. Kenner
V. Pres. Natchez Steel
6750 W. Loop South
Suite 100
Bellaire, Texas 77401

16. Frank Copeland
Sabel Steel Service Inc.
749 North Court
Montgomery, Alabama

17. E. W. Hodge
3143 Hathaway Place
Montgomery, Alabama

18. Tom Laille
Old Ridge Road
Rt. 6, Box 207-A
Pratville, AL 36067

19. Charles Chesser
Summit Steel
Birmingham, AL

20. Micky Strange
Shelby Steel
Birmingham, AL

21. Carl Kreuger

22. Shirley Parks
3446 Wilmington Road
Montgomery, Alabama

23. Jim Parsons
5751 Industrial Parkway
Theodore, Alabama

24. Saxton Raines

25. Jim Givens
5212 Maudelayne Dr. S.
Mobile, Alabama

26. Harold McBrayer
J. M. Tull Metal Co.
Birmingham, Alabama

27. J. Allen Reynolds
First Alabama Bank
8 Commerce Street
Montgomery, Alabama

28. William M. Jordan, Jr.
1253 Augusta Street
Montgomery, Alabama

29. Jim Creim
Cumberland Valley Metal
44515 Harding Road
Nashville, Tenn. 37205

30. James Rabalais
P. O. Box 246
Marrero, LA 70072

31. Robert H. Clements, CPA
4300 Midmost Drive
Mobile, Alabama

32. Tim Hill
Bud's Boat Service

33. Larry Whitehead
MCM Industries
Birmingham, AL

34. Lambert Parker
Shelby Steel
Birmingham, Alabama

35. June Neely Williams
Parsons Steel Inc.
Mobile, AL

36. Melba Parsons

37. Joe Cherry

38. Joel Buchannan

39. Tony Artale
Michigan Metals
Birmingham, Alabama

40. Rick Bailes
OSI, Inc.

41. Paul Norris
First Alabama Bank
8 Commerce Street
Montgomery, AL

42. George T. Goodwyn
Goodwyn Engineering
525 Augusta Street
Mongtomery, Alabama

43. Charles Brightwell
2077 Myrtlewood Dr.
Montgomery, Alabama

44. Farley Moody

45. John Mason

46. Luther Ingalls

47. Cecil Spear

48. Malcolm Humphreys

49. Matthew Orange

50. Buzz Harrell

51. Paul Norris

52. Robert G. Myers

53. Al McDonald

54. Any witnesses listed by Defendants.

55. Any witnesses whose identity or necessity is learned through outstanding discovery.

BEASLEY AND WILSON
BY: Frank M. Wilson

Plaintiff's Exhibit 6

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

No. 79-249-N

[Caption Omitted]

WITNESS LIST OF PLAINTIFFS
PARSONS STEEL, INC. ET AL

Plaintiff, Parsons Steel, Inc. et al. expects to call as witnesses at the trial of the above-styled case the following individuals:

1. Jim D. Parsons
2. Melba L. Parsons
3. Joseph Cherry
4. June J. Neely
5. Larry Whitehead
6. Tom Laille
7. Tim Hill
8. E. W. Hodge
9. Larsen Edge
10. E. Farley Moody, II
11. Albert Keuler
12. Cecil Thompson
13. Carl Kruegger
14. Robert Mays
15. Al McDonald
16. Robert Dince

17. Ross S. Trawick
18. Henry A. Leslie
19. Walter H. Givham
20. W. Jack James, Jr.
21. S. William Cole
22. F. J. Smyser
23. L. H. Moore
24. Richard C. Solomon
25. William M. Morris
26. W. Donald Davis
27. Edward Herbert
28. William Richardson
29. James S. Gaskell, Jr.
30. Charles M. Hines
31. Paul Norris
32. William E. Epperson
33. Thomas R. Peacock
34. J. Allen Reynolds
35. Charles P. Brightwell
36. George Thomas Goodyin
37. William M. Jordan, Jr.
38. Michael Orange
39. Luther Waller

40. Samuel Kaufman

41. Randy Kenner

42. Ronald J. Gropper

43. Lawrence D. Greenberg

44. James Rabalais

45. Carl Martin

46. William Truitt

47. Frank Copeland

48. Walter E. Nilsen

Plaintiffs expect the expert testimony of the individuals numbered 14-26 to be that the requirement of a change in management and the sale of majority stock in a corporation is not a requirement usually made in connection with an extension of credit especially where, as here, the sale of majority stock generates no additional capital as security for the loan and where no additional loans were made. In addition, it is expected that those witnesses will offer their expert opinions as to whether the loan in question was handled by Defendant as a loan of a corporation in "serious financial difficulty." Those witnesses will further be asked their expert opinions of the manner in which "prudent bank management" should have brought the "serious financial difficulty" of a loan customer to the attention of the bank's top management and are likely to be asked to interpret and give their expert opinions on the various entries on the loan recap of subsidiary.

Dr. Robert Dince will additionally testify concerning the requirements of the Comptroller of the Currency and National Bank Examiners on banking institutions as to internal control and internal reviews of loans. He will almost certainly be ques-

tioned concerning whether or not Defendant followed its own loan policy in the instant case.

Plaintiffs do not anticipate using depositions excpet for impeachment or if one of the previously deposed witnesses is not available at trial.

After deposing Defendant's accounting expert Plaintiffs may be required to introduce expert testimony to contradict his testimony.

It seems apparent from Defendant's lists of witnesses and exhibits that it will question the value of the collateral on the loans to subsidiary. If that is the case, the witnesses numbered 1, 3, 5-8, 12 and 41-48 will be expected to testify as experts in the steel industry to the value of the equipment and inventory of subsidiary. Whether such testimony and additional expert witnesses on that question are necessary will depend in part on the Court's ruling on Plaintiffs' Motion for Clarification now pending.

BEASLEY AND WILSON

BY: Jere L. Beasley

BY: Frank M. Wilson

Attorneys for Plaintiffs

Plaintiff's Exhibit 8

[956] the bank did was a usual, customary, accepted bank practice. Now, during the trial, they also threw in some other things. First of all, they just flatly denied there was anything wrong, which we expected. We expected them to do that. But their real defense was that. And you recall his opening statement to you he said, "It was just an ordinary, garden-type of act by the bank." The act by the bank he was talking about was this: The bank required of a man who had worked in that business after he bought it and had run it, required of him that he give up that business to a stranger, a man that he didn't even know. Give up ownership of it and give up the running of it by allowing this gentleman to become president and chief executive officer of the corporation.

Now, let me ask you first of all, does it make sense that a businessman would give up what he had worked for and what he had earned for one hundred dollars? Does that make sense? A lot of things in this case really hadn't made sense, but when you go back and look at the testimony and analyze it, people like Sam Kaufman, Luther Waller, even June Neely, had no reason to come to court and lie. She had worked for them and she now lives over in Mississippi and came and testified. Ed Hodge had no interest in the **[957]** outcome of this lawsuit; none whatsoever. And he came in here, and do you remember what he said? He said he went out there in October and November and December. He said it was — and I think I am going to quote him accurately — said it was an excellent manufacturing plant. He said the only thing he saw they had too much inventory. And do you recall, I asked him the question, I said, "Mr. Hodge, could that inventory have been sold?" He said, "Without question." I said, "Was it good and useable?" And he said, "Without question." He knew the operation of this plant. Why? Because he had owned it. And he said he had been back out there almost monthly from the day he sold it to Parsons, and he said in December, the critical month, that the in-

ventory was there, it was useable, and it was inventory that could have been sold.

And the reason I asked these questions about the coils, when this case first came to my office and they were talking about coils, I related coils to automobiles. That is the only experience I had had in this field. I asked him what a coil realy was, and I looked at coils, and I found out that a coil could weigh as much as twenty thousand pounds. It could weigh that much. Can you imagine twenty thousand pounds of steel that would be used **[958]** to manufacture a number of items, not just one item as the defense would lead you to believe, but a number of items.

Do you remember what Mr. Hodge said that steel was worth? There was testimony, undisputed, thirty-three cents a pound. And do you recall how many coils they said was on the premises? He said too much. He said he had more inventory than what they could use.

Now, I asked him specifically — and remember what he said when I asked this question? I said, "Mr. Hodge, did you see any scrap as you toured the plant and looked over the facilities?" Do you remember what he said? "Very little. Very little, scrap. All of it was useable, good material."

This is why my good friend, Lannie Crane, who is an excellent accountant and was hired to do a job and he was hired to reach a result given certain information. And do you remember what he said when Mr. Wilson was cross-examining him, very nicely and very easily? He asked him this question: He said something to the effect, "Were most of the assumptions if not all of the assumptions that you made favorable to the bank?" He said, "Yes." "Where did you get the information?" "From Mr. Nachman or Mr. Orange and **[959]** folks on the other side." Nothing from Mr. Parsons. Nothing from anybody who worked for Mr. Parsons, except one secretary who is still out there who he said could give nothing significant. And he admits he didn't know what a coil was and he admits he never had real-

ly seen any of the things he was talking about. He didn't, for example, realize that you estimate work-in-process in many businesses, and that work-in-process is estimated; what could be, say a hundred and twenty thousand, in actuality could have been as much as five hundred thousand. No way for Lannie to know this.

But what I am saying is, Mr. Hodge did know. He had been there. He had seen it. He had owned, in fact, the business at one time; the plant. Can you imagine a plant sitting on twenty acres of land? Three massive buildings? Do you remember what he said about the bay? He compared it to this courtroom. He said one of the bays would be the size of this courtroom. Now, there were many bays in that plant, you see. All of them functional, all of them operative, working with good inventory, good equipment. And if a man who had no interest came in this court and stated under oath that that was an excellent manufacturing facility, I would have to believe **[960]** him. They didn't try to cross-examine him, did you notice, on that point. Very, very light.

Now, obviously the witness who testified who are directly involved, obviously have an interest in the outcome. That would include Mr. and Mrs. Parsons, it would include Mr. Herbert; it would include Mr. Herbert; it would include Mr. Gaskell, it would include Mr. Orange, it would include a number of people who testified for the defense. But I have never seen so many inconsistencies between their own witnesses.

For example, Mr. Waller said — and I think he tried to tell it as straight as he could. He said he saw...felt sure he saw Mr. Herbert over there in a private meeting. He also said he recommended his law partner, Sam Kaufman, which certainly makes sense; if there is a fee to be made, he is going to recommend his partner. And that was back in early...on the 14th of December.

Mr. Orange said Mr. Herb t recommended Mr. Kaufman. Obviously, Mr. Kaufman was already involved. But Mr. Waller and Mr. Kaufman had no reason to come in here and tell anything but the truth.

Do you remember when we were talking about the 8th day — and I wrote it down and circled it for a reason. I said, "When did Michael Orange lose **[961]** interest in the plan you were trying to foster" — the lawyer — "and start on his plan and Mr. Herbert's plan?" And that plan was to turn over the business to a stranger who Jim Parsons didn't even know. I said . . . I asked him several times — the Judge had to fuss at me about it a little bit, but I do that sometimes. I just want to make sure the Jury hears the important points in a trial — I said, "Did Mr. Orange, from that point on until the end of it, talk to you and ask questions about how this would work and how that would work; how he could buy it or anybody else could buy it; how this would work, the legal ramifications?" And do you remember what Mr. Kaufman said? He said, "Yes. Many times. Many times." I asked the same question of Mr. Orange: "No knowledge of it. Couldn't remember it." I asked him this. I said, "Why didn't you use Mr. Kaufman when you got ready to buy this business? Why didn't you use Mr. Waller instead of going out and forming this new corporation and doing it with secretaries and lawyers, not even using your own name, and not even using the initials that finally went into it? Why didn't you do that?" He never did give a very good answer to that, in my opinion.

Now think back for just a minute. This **[962]** bank loaned a person who formed a corporation — a shield-type corporation to keep the individual from having any liability, you see — formed a corporation, loaned that corporation without any assets at that time one point three million dollars. That is a lot of money. A lot of money.

Now, you can bring your own experience into this jury box. You do not have to shut out your experience when you come in to make a decision on a case. Let me ask you this: Would a bank loan anybody who formed a new corporation, unless he was a multi-millionaire many times over, one point three million dollars unless he got some of that multi-millionaire's collateral or some other assets to back up that loan? I don't believe he would. I don't believe Mr. Ed Herbert would do that because he has been in the banking business a long time, a long time. One point three million, Mr. Orange put up one thousand dollars. He got the land, he got all of the assets, all of the coils Mr. Hodge told you about, and Mr. Parsons, all of the equipment; everything out there. They shut out, effectively, the unsecured creditors. That is out, at this point. But they get a valuable piece of property, they get a good business, they get the Parsons' business. And they [963] are going to tell you that Mr. Parsons benefited from this arrangement. They are going to try to tell you that Mr. Parsons actually dreamed this scheme up.

I want you, when you go back into the jury room to deliberate to look and see if you can find anywhere in these records that have been put into evidence in this case where the bank has any records anywhere bad about Jim Parsons, Melba Parsons, or Parsons Steel, Inc., but specifically, anything bad about the company here in Montgomery. You won't find anything. The first thing you will find is Exhibit 59, I believe, where the Directors meet, and that exhibit will say, basically, that...well, I won't try to state it. I will read it to you.

I will say, exactly, the first report to that board...and remember this. Mr. Herbert wrote the manual. I want you to read, if you will — now, I hate to ask you to do this because it is fairly thick — but find the sections in here that define the responsibilities of the loan officer, find Mr. Herbert's responsibility in this book, find the directors loan committee's responsibility in this book, and see exactly what it says they are supposed to do. And then after you do that, you take the documents

[964] that show the transactions...and you recall what Dr. Dense who testified who we hired as an expert — and we certainly don't apologize for that. Each side has a right to bring in experts and put them on the stand, especially in critical points. And the critical point in this case is — was there a violation of the bank holding company act. The critical issue is was what the bank did — which they now deny, or which they spent most of their time trying to justify, if you remember — was that a usual, in other words a customary, accepted, appropriate banking practice; as Mr. Nachman says, a garden variety type act by the bank?

I want you to go back and look at the records and find anywhere in here, up until the bank did this to the Parsons, where they say anything but good about the Parsons, about this business. And then take...Mr. Hines made this report, and I guarantee you that Mr. Hines hated to testify in this case. He didn't want to be on that stand. I don't blame him. Because he did exactly what anybody would have done; he made the review and he said he talked to the loan officer, Mr. Richardson, and he said...He answered all my questions just as honestly as he could. He said, "Yes, he did this. He made the **[965]** review."

Now, obviously if the loan had been in trouble they wouldn't have turned it over to a junior person in the bank that has got a responsible position, but they would have given it to somebody, I believe, that would have really torn this thing apart if the loan had been in trouble in August of 1978 like Mr. Richardson would not like you to believe.

Everything just ties together, Ladies and Gentlemen. Look at the records; at what they put on the stand. Think back on the testimony. They violated this Act. It is not a criminal trial, though. There is no criminal act on the part of the bank, in my opinion. I believe they violated the civil law, without question. I think they have damaged the Parsons, without question, they have hurt them.

But the issue in this case is, did they violate the Bank Holding Company Act? Now, I want you to just look at these records. Look at them carefully because that is really what the lawsuit is all about.

Dr. Dense, as I was going to tell you, made the statement on that stand that he acutally helped write the manual for the examiners who examine these national banks. He has actually been involved **[966]** in that activity. He actually has great knowledge of the banking industry. They didn't try to destroy Dr. Dense's credibility. In fact, they didn't question anything about it. This man knows his business. He is an expert. He said he has testified on both sides; he has testified for banks and he has testified for plaintiffs, and he tells it exactly like it is. He didn't try to dodge any questions. The Judge had to fuss at him one time about fencing with Mr. Nachman and, frankly, I wish he hadn't. But the whole truth of the matter is, he said if there was anything wrong with that loan you would find it in the bank records. Do you remember that question asked him? He said it would be in the bank's records if the Parsons had done anything wrong. So, that tells me they didn't consider this much of a problem loan, really. It was well collateralized. Look at what the records said.

Go back to...Mr. Herbert himself passed on that loan back in '77 for a half a million dollars; five hundred thousand dollars. They made Mr. Parsons put up everything you can imagine. Made his wife sign a personal guaranty — of course, she did on the stock — they got a guarantee out of it, also they got one out of Mr. Parsons, also they got the land...**[967]** or a mortgage, which Mr. Herbert skillfully didn't tell you much about during the direct testimony.

You remember what he said? Exactly what he said? I wrote it down. And I hope Mr. Nachman disputes me on this one point because he is going to dispute me on a lot of points. I want him to dispute me on this fact: Mr. Herbert, as I recall his testimony,

said, the reason that we had to take hold of this plan of Jim Parsons — where he wanted to give his business away — the reason we accepted it so quickly and didn't even talk to Mr. Orange much — just sort of like he was a stranger to us; we have never heard of this man Orange — and you remember all this. Mr. Herbert said, "The reason we had to do it was because Jim Parsons could throw us off the land if we were to go in there and take this plant."

Now, let me tell you the exact truth on that. On cross-examination he said, "Yes. We did have a mortgage. Yes. We did." I said, "Could you have foreclosed that mortgage just like you did the personal property?" He kind of ducked his head.

Did you notice on direct examination he was eager to answer questions? Made a magnificent witness. In fact, sometimes he even answered the questions before the lawyer really asked them. In fact, do you **[968]** remember when we were talking about the business of the private meetings? He refused on that because he knew the answer to the question was something else. And he said "I made one mistake." Said, "Yes, I thought I was in that meeting but I really wasn't, even though Mr. Waller saw me and Mr. Kaufman saw me." And Mr. Orange, I believe, also saw him — I am not sure what he testified on that.

But now he is trying to say that "we just had no choice but to take this land...or this property, this plant. Because he still had the land." But he admitted on cross-examination, "Yes. We could have foreclosed"; reluctantly he admitted it. But he said, "They didn't owe us but two hundred thousand dollars. We couldn't get but that part of it." I think that is incorrect and I think the Court will so state that they have a right to foreclose the mortgage, and the only rights that the landowner has is to redeem it at any time later within a certain period of time in this state, if he can get up two hundred thousand dollars plus the cost and everything that the bank has spent as a result

of this. That is the law of the state, and if not I will be corrected.

Now, let me ask you this: If Jim Parsons in that little short time could have come up with two **[969]** hundred thousand dollars, that quick from the corporation, why didn't he just pay the notes up to date? They were without question in default. Look at them closely to see when they were in default. You notice they didn't say much about that.

Now, it all just ties right together when you think about it; when you analyze it. And I believe that any argument that Jim Parsons gained out of this is going to be mighty hard to sustain because, obviously, without question, this was a good business. Everybody has cash flow problems, anybody in the business has it.

I will have the opportunity to respond very briefly to Mr. Nachman's argument to you. I appreciate your attention, and I will reserve the rest of my time for then. Thank you.

THE COURT: Mr. Nachman?

MR. NACHMAN: May it please the Court, and Ladies and Gentlemen of the Jury. I want to join Jere Beasley in thanking you for your attention here in very difficult circumstances. I know that most of you had to come a long way for a four-day trial, and we appreciate it because you people and the Judge here are the only people that we have to resolve the disputes when they arise between persons or persons and...

Plaintiff's Exhibit 9

IN THE CIRCUIT COURT OF MONTGOMERY
COUNTY, ALABAMA
No. 83-304-T
[Caption Omitted]

SUMMONS

To Any Sheriff or any person authorized by Rule 4.1(B) of the Alabama Rules of Civil Procedure to effect service in the State of Alabama:

You are hereby commanded to serve this summons and a copy of the complaint in this action upon defendant.

FIRST ALABAMA BANCSHARES
c/o ROBERT E. STEINER, III
8th Floor
First Alabama Bank Building
Montgomery, Alabama 36104

FIRST ALABAMA BANK OF MONTGOMERY
c/o James S. Gaskell, Jr.
8 Commerce Street
Montgomery, Alabama 36104

Each defendant is required to serve a copy of a written answer to the complaint upon

Honorable Jere L. Beasley
Attorney at Law

plaintiff's attorney, whose address is

P. O. Box 4537
Montgomery, Alabama 36101

within thirty (30) days after service of this summons excluding the day of service of the summons and to file the original of said written answer with the Clerk of this Court at the time of service of the answer upon the Attorney of Record for the Plaintiff or

within a reasonable time thereafter. If any defendant fails to do so, a judgment be default may be entered against that defendant for the relief claimed in the complaint.

DEBRA P. HACKETT
Clerk and Register

COMPLAINT

1. Plaintiff Jim D. Parsons is over the age of nineteen years and a resident citizen of Mobile County, Alabama.

2. Plaintiff Melba L. Parsons is over the age of nineteen years and a resident citizen of Mobile County, Alabama.

3. Plaintiff Parsons Steel, Inc. is an Alabama corporation with its principal place of business in Mobile County, Alabama.

4. Defendant First Alabama Bancshares (hereinafter "Bancshares") is a bank holding company and owns all or substantially all of the outstanding shares of Defendants First Alabama Bank of Montgomery, N.A. and Merchants National Bank. At all times material hereto Defendant Bancshares was in control of Defendant First Alabama Bank of Montgomery, N.A. and Merchants National Bank.

5. Defendant First Alabama Bank of Montgomery, N.A. (hereinafter "First Alabama") is a national banking organization with its principal place of business in Montgomery County, Alabama.

6. Defendant Merchants National Bank (hereinafter "Merchants National") is a national banking organization with its principal place of business in Mobile County, Alabama. At all times material hereto after January 1, 1982, Defendant Merchants National was owned and controlled by Defendant Bancshares.

7. At all times material hereto Plaintiffs Jim D. Parsons and Melba L. Parsons personally guaranteed the debt of Parsons Steel Inc. to Merchants National. In addition, Merchants National held a second mortgage on the Parsons family home as security.

8. On or about February 15, 1979, Plaintiffs filed suit against Defendant First Alabama and others for fraud, conspiracy to defraud, breach of fiduciary duty, and violations of the Alabama Uniform Commercial Code in Montgomery County Circuit Court in an action styled Parsons Steel Industries, Inc., et al. v. First Alabama Bank of Montgomery, N.A., et al., Civil Action No. CV-79-179-TA (hereinafter "Circuit Court action"). Parsons Steel Industries, Inc., a wholly owned subsidiary of Parsons Steel, Inc., was also a plaintiff in that action, and was later replaced by the Trustee in Bankruptcy.

9. On or about February 9, 1983, a jury returned a verdict in the aggregate amount of $4,000,001.00 against First Alabama and its Senior Vice President Edward Herbert in the Circuit Court action.

10. Prior to the trial date two other Co-Defendants entered into a pro tanto settlement with Plaintiffs in said action and were dismissed as Defendants.

11. Since 1972, Plaintiff Parsons Steel, Inc. has been a loan customer of Defendant Merchants National. Said Plaintiff has been a good loan customer of the bank. In 1978, Plaintiff Parsons Steel, Inc. had a line of credit with Defendant Merchants of approximately $2,000,000.00.

12. In 1979, as a result of the wrongful acts of Defendant First Alabama and others, as alleged in the Circuit Court action, Plaintiff Parsons Steel, Inc.'s wholly owned subsidiary (Parsons Steel Industries) was rendered an involuntary bankrupt. After its adjudication as an involuntary bankrupt, Parsons Steel Industries only asset was its claim against Defendant First Alabama Bank and others for the wrongs done to it.

13. Defendant Merchants National continued to finance Plaintiff Parsons Steel, Inc. under the same financing arrangement although the assets of Parsons Steel, Inc. were greatly reduced by the forced bankruptcy of its wholly owned subsidiary.

14. In approximately December of 1981, Defendant Bancshares obtained a controlling interest in Defendant Merchants National and the merger of Defendant Merchants National into Defendant Bancshares (the bank holding company) was approved by the Comptroller of the currency. At that time Plaintiffs' claim against Defendant First Alabama was pending in Montgomery County Circuit Court.

15. In February of 1982, Defendant Merchants National forced Plaintiff Parsons Steel, Inc. to materially alter the customary method of financing its business. At that time Plaintiff Parsons Steel, Inc. was totally and completely dependent upon Defendant Merchants National for financing, due to its long-standing relationship and the devaluation of its assets caused by the wrongs of Defendant First Alabama and others. Plaintiff Parsons Steel, Inc. had no alternative but to accept the change in method of financing forced on it by Defendant Merchants National.

16. Defendant Merchants National forced and coerced Plaintiff Parsons Steel, Inc. to meterially alter its method of financing, but agreed to the continued financing of the business on a specified formula agreed to between the parties.

17. Loan officers of Defendant Merchants National, acting as its agents, promised to continue financing Plaintiff Parsons Steel, Inc. under the above-stated formula.

18. In the Fall of 1982, Plaintiffs discovered for the first time that Defendant Merchants National had never advanced funds in accordance with the formula, which had been forced on Plaintiffs. Plaintiff Jim D. Parsons, on behalf of the other

Plaintiffs, demanded that Defendant Merchants National live up to its agreement but said Defendant refused.

19. On or about December 3, 1982, the method of financing Parsons Steel, Inc. was again altered, in that Defendant Merchants National, by and through its loan officers, agreed ot the continued financing, as before, with the one change that Plaintiff Parsons Steel, Inc. would only be required to pay interest monthly at 7%. The change was made retroactive to November 1, 1982.

20. In or about November, 1982, Defendant Merchants National failed and refused to open letters of credit for Plaintiff Parsons Steel, Inc., although the amounts were well within the agreed upon financing arrangement, and fail and refuse to do so to the present date.

21. During the week of January 24, 1983, negotiations took place between the parties to the Montgomery County Circuit court action concerning the possibility of settlement. Plaintiffs are informed and believe, and upon information and belief, allege that Defendants Bancshares and Merchants National were parties to those negotiations and participated in them.

22. On or about February 9, 1983, jury verdicts were returned in the Circuit Court action in favor of the Plaintiffs therein as follows: Parsons Steel Industries, Inc. in the amount of $2,000,000.00; Parsons Steel, Inc. in the amount of $1.00; Jim D. Parsons in the amount of $1,000,000.00; and Melba L. Parsons in the amount of $1,000,000.00. After the payment of all creditors approximately $1,200,000.00 of the $2,000,000.00 verdict in favor of Parsons Steel Industries, Inc. will be an asset of Parsons Steel, Inc.

23. After the jury verdict, Plaintiff Jim D. Parsons and Melba L. Parsons met with representatives of Defendant Merchants National to discuss a change in the method of financing of Parsons Steel, Inc. Plaintiffs were informed that no change

was possible unless they agreed to assign all interest in the jury verdict in the above mentioned Circuit Court action to Defendant Merchants National. Plaintiffs were instructed by loan officers of Defendant Merchants National to propose a method which would provide for the proper financing of Parsons Steel, Inc.

24. A meeting was held on or about February 11, 1983, attended by representatives of Bancshares, First Alabama and Merchants National. Plaintiffs are informed that Merchants National gave confidential information concerning Parsons Steel, Inc. to Bancshares and First Alabama. Plaintiffs further allege that the purpose of the meeting was to discuss methods and means by which to force Plaintiffs to settle the Circuit Court action at less than its full value.

25. Plaintiff Jim D. Parsons met with the accountant for Parsons Steel, Inc. and worked out the details of the plan he would propose to Defendant Merchants National.

26. When Jim D. Parsons contacted Defendant Merchants National in order to set up a meeting so that the proposal could be discussed, he was informed that Defendant Merchants National had been instructed by Defendant Bancshares not to continue financing Parsons Steel, Inc. unless the Circuit Court action against Defendant First Alabama was settled.

27. Jim D. Parsons then requested that the letters of credit that were currently pending at Merchants National and which were then well within the established credit line be opened. Defendant Merchants National refused to take any action to continue financing Parsons Steel, Inc. under the current formula unless the Circuit Court action was settled. Jim D. Parsons was instructed by Defendant Merchants National to make a specific proposal which would settle matters both at Merchants National and First Alabama Bank of Montgomery, N.A.

COUNT ONE

28. Plaintiffs reallege paragraphs 1 through 27 of their complaint as if set out here in full.

29. Defendant Merchants National has breached its contract with Plaintiff Parsons Steel, Inc. for the financing of the business.

30. As a result, Plaintiffs have been damaged as follows: a. Parsons Steel, Inc. has lost business and has lost its ability to do business;

Jim D. Parsons has suffered severe emotional distress and mental pain and anguish;

Melba L. Parsons has suffered severe emotional distress and mental pain and anguish.

COUNT TWO

31. Plaintiff realleges paragraphs 1 through 27 of their complaint as if set out here in full.

32. When Defendant Merchants National, by and through its agents, servants or employees, promised to finance Parsons Steel, Inc., under the formula forced upon said Plaintiff in February, 1982, it never intended to perform that promise.

33. The promises made by Defendant Merchants National, by and through its loan officers, were made with no intention of performing them and with the intent to deceive Plaintiffs.

34. The fraudulent actions of Defendant Merchants National, as alleged in this count, were done intentionally, willfully and wantonly and with a design to harm Plaintiffs.

35. Plaintiffs relied upon the misrepresentations by said Defendant and continued to do business with this Defendant and did not attempt to secure other bank financing.

36. Plaintiffs were damaged as a result of the fraudulent actions of Defendant Merchants National as set forth in paragraph 30 above.

COUNT THREE

37. Plaintiffs reallege paragraphs 1 through 27 of their complaint as if set out here in full.

38. Defendants entered into a conspiracy beginning on or about January 1, 1982, to force an unreasonable and unwarranted financing arrangement on Parsons Steel, Inc. knowing that the result of the said method would be to restrict Parsons Steel, Inc.'s ability to do business and ultimately result in its demise.

39. By forcing the said financing arrangement on Parsons Steel, Inc. Defendants intended to deprive Plaintiffs of their ability to continue prosecution of the Circuit Court action to a successful conclusion.

40. The actions of Defendants alleged in this Count were done maliciously, willfully, and intentionally.

41. Defendant Bancshares and First Alabama are guilty of the fraudulent acts performed by Defendant Merchants National as a result of conspiracy.

42. Plaintiffs were damaged as a result of the conspiracy alleged in this count as set forth in paragraph 30 above.

COUNT FOUR

43. Plaintiffs reallege paragraphs 1 through 27 of their complaint as if set out here in full.

44. A contractual relationship existed between Plaintiffs and Defendant Merchants National.

45. Defendants First Alabama and Bancshares have intentionally, wrongfully, and tortiously interfered with that contract.

46. Plaintiffs have been damaged as a result of Defendants First Alabama and Bancshares intentional, wrongful, and tortious interference with the above contractual relationship.

47. Plaintiffs were damaged as set out in paragraph 30 above.

COUNT FIVE

48. Plaintiffs reallege paragraphs 1 through 27 of their original complaint as if set out here in full.

49. Beginning on or about January 1, 1982, and continuing to date, Defendants conspired to deprive Plaintiffs of their business and/or property.

50. As a part of the said conspiracy, it was agreed by between and among the Defendants that the following overt acts would be performed:

a. Defendant Merchants National through the use of its economic power resulting from the longstanding relationship between Plaintiffs and Merchants National, and the damage done to Plaintiffs as a result of the wrongful actions alleged in the Circuit Court action, to force upon Plaintiffs an unnecessary and unwarranted financing arrangement which would restrict Plaintiff Parsons Steel, Inc.'s borrowing to the extent that it would lose its ability to do business.

b. That Defendant Merchants National would put pressure on Plaintiffs to settle their claim against Defendant First Alabama;

c. That Defendant Merchants National would fail and refuse to honor the financing arrangement it had forced on Plaintiffs;

d. That Defendant Merchants National would ignore letters of credit requested by Plaintiff Parsons Steel, Inc. and refuse to honor said letters of credit, even though well within the financing arrangement forced on Plaintiff by Defendants;

e. That Defendant Merchants National would condition continuation of financing for Plaintiff Parsons Steel, Inc. on Plaintiffs' settlement of its claim against Defendant First Alabama for less than full value;

f. That Defendants would from time to time in person and by telephone discuss the status of the ongoing conspiracy;

g. That Defendant Merchants National would provide Bancshares and First Alabama with confidential information relating to Plaintiffs.

51. As a result of the aforesaid conspiracy, Plaintiffs have suffered substantial damage in their business.

COUNT SIX

52. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 27 of their complaint as if set out here in full.

53. Defendants, acting together and in concert, intentionally and by design, or recklessly, inflicted severe emotional distress on Plaintiffs Jim D. Parsons and Melba L. Parsons.

54. Defendants intentionally, willfully, and in bad faith, committed the acts alleged hereinabove with an intent to injure and damage said Plaintiffs.

55. Defendants knew, or should have known, that their actions would have the intended or desired effect and that Plaintiffs would lose their business in Mobile, Alabama.

56. Defendants' actions were designed solely for the purpose of securing a settlement of the Circuit Court action on terms favorable to Defendant First Alabama Bank.

57. The aforesaid acts by Defendants were extreme and outrageous and were designed to injure and damage Plaintiffs Jim D. Parsons and Melba L. Parsons.

58. As a result, each Plaintiff has suffered severe emotional distress and were injured and damaged as set forth in paragraph 30 above.

WHEREFORE, Plaintiffs demand judgment against Defendants as follows:

1. Compensatory damages in the following amounts:

Parsons Steel, Inc.	$15,000,000.00
Jim D. Parsons	$ 2,500,000.00
Melba L. Parsons	$ 2,500,000.00

2. Punitive damages in the following amounts:

Parsons Steel, Inc.	$33,000,000.00
Jim D. Parsons	$33,000,000.00
Melba L. Parsons	$33,000,000.00

3. Their costs of this action.

BEASLEY AND WILSON

BY: Jere L. Beasley
Attorneys for Plaintiffs

JURY DEMAND

Plaintiffs hereby demand trial by jury for all issues of this cause.

Jere L. Beasley
Of Counsel

Defendant's Exhibit 1

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-G

[Caption Omitted]

RENEWED MOTION TO DISMISS AMENDED COMPLAINT OF DEFENDANT FIRST ALABAMA BANK OF MONTGOMERY, N.A.

Defendant, First Alabama Bank of Montgomery, N.A., moves that the Court dismiss the complaint as amended, in its entirety, and each count thereof, on the following separate and several grounds:

1. Plaintiff Parsons Steel Industries, Inc. has no standing to bring this action, and is an improper party to it, in that it has been adjudged a bankrupt in In Re: Parsons Steel Industries, Inc., Bankruptcy No. 79-173-N, United States District Court for The Middle District of Alabama, and the real party in interest to prosecute its rights in this action is the Trustee in Bankruptcy, A. Pope Gordon.

2. Complete relief in this action cannot be accorded among the parties without the joinder of the Trustee in Bankruptcy for Parsons Steel Industries, A. Pope Gordon, in that he claims an interest relating to the subject of this action and is so situated that the disposition of the action in his absence may as a practical matter impede his ability to protect that interest or leave the Defendant First Alabama Bank of Montgomery, N.A. subject to a substantial risk of incurring double, multiple, or inconsistent obligations by reason of the Trustee's claim.

3. Plaintiffs, Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons have no standing to bring this action, and are improper parties to it.

4. There is no jurisdiction of the subject matter insofar as the actions of these plaintiffs are concerned.

5. Defendant assigns grounds 3 and 4 on the basis that neither officers, nor stockholders, nor controlling stockholders, nor a sole stockholder can maintain an action to recover for an injury to the corporation in which the stock is held, even though the value of the stock may be impaired as a result of the injury, and even though the acts complained of may have resulted in damage both to the corporation and to the stockholder.

6. The complaint, as amended and each count thereof, fails to state a claim upon which relief can be granted.

7. The complaint, as amended and each count thereof, fails to state a claim against this defendant upon which relief can be granted.

8. The complaint, as amended and each count thereof, fails to state a claim against this defendant upon which relief can be granted in that fraud has not been averred with the particularity required by Rule 9(b) A.R.C.P.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.
Attorney for Defendant, First
Alabama Bank of Montgomery

Defendant's Exhibit 2

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-G

[Caption Omitted]

RENEWED MOTION TO DISMISS AMENDED COMPLAINT OF DEFENDANT HERBERT

Defendant, Edward Herbert, moves that the Court dismiss the complaint as amended, in its entirety, and each count thereof, on the following separate and several grounds:

1. Plaintiff Parsons Steel Industries, Inc. has no standing to bring this action, and is an improper party to it, in that it has been adjudged a bankrupt in In Re: Parsons Steel Industries, Inc., Bankruptcy No. 79-173-N, United States District Court for The Middle District of Alabama, and the real party in interest to prosecute its rights in this action is the Trustee in Bankruptcy, A. Pope Gordon.

2. Complete relief in this action cannot be accorded among the parties without the joinder of the Trustee in Bankruptcy for Parsons Steel Industries, A. Pope Gordon, in that he claims an interest relating to the subject of this action and is so situated that the disposition of the action in his absence may as a practical matter impede his ability to protect that interest or leave the Defendant Herbert subject to a substantial risk of incurring double, multiple, or inconsistent obligations by reason of the Trustee's claim.

3. Plaintiffs, Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons have no standing to bring this action, and are improper parties to it.

4. There is no jurisdiction of the subject matter insofar as the actions of these plaintiffs are concerned.

5. Defendant assigns grounds 3 and 4 on the basis that neither officers, nor stockholders, nor controlling stockholders, nor a sole stockholder can maintain an action to recover for an injury to the corporation in which the stock is held, even though the value of the stock may be impaired as a result of the injury, and even though the acts complained of may have resulted in damage both to the corporation and to the stockholder.

6. The complaint, as amended and each count thereof, fails to state a claim upon which relief can be granted.

7. The complaint, as amended and each count thereof, fails to state a claim against this defendant upon which relief can be granted.

8. The complaint, as amended and each count thereof, fails to state a claim against this defendant upon which relief can be granted in that fraud has not been averred with the particularity required by Rule 9(b) A.R.C.P.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.
Attorney for Defendant
Edward Herbert

Defendant's Exhibit 3

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-G

[Caption Omitted]

ORDER

The Court having read and considered the renewed motion to dismiss filed by Defendant First Alabama Bank of Montgomery, N.A., it is ORDERED that the trustee in bankruptcy for Parson Steel Industries, A. Pope Gordon, be joined as a party plaintiff to this action and that a copy of this Order be mailed to the trustee and his counsel, Honorable James Jerry Wood.

It is further ORDERED that the renewed motion to dismiss is in all other respects due to be, and the same is, hereby DENIED.

DONE AND ORDERED this the 12th day of December, 1979.

/s/ William R. Gordon
Circuit Judge

Defendant's Exhibit 4

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT
No. CV-79-179-G
[Caption Omitted]

ORDER DENYING SUMMARY JUDGMENT

The court having read and considered defendants' Motions for Summary Judgment, and the court having further read and considered briefs of counsel concerning said motions, the court is of the opinion that the plaintiffs' claim that the value of their stock was reduced is not sufficient grounds to support a personal cause of action against the defendants. The court is of the further opinion, however, that the plaintiffs' personal guaranty of the loans from the defendant First Alabama Bank to subsidiary, which guaranty has not been released by the bank, constitutes sufficient basis for plaintiffs to maintain this action in their individual capacities. The court further finds that neither *res judicata* nor *collateral estoppel* precludes the prosecution of the instant claim.

It is therefore, ORDERED that the defendants' Motions for Summary Judgment are DENIED.

DONE and ORDERED in chambers this 17th day of March, 1982.

/s/ William R. Gordon
Circuit Judge

Defendant's Exhibit 8

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-T

[Caption Omitted]

ORDER OF COURT ON SUMMARY JUDGMENT

Defendants First Alabama Bank of Montgomery, N.A., Edward Herbert, OSI, Inc. and Michael Orange, having filed their respective motions for summary judgment; and the Plaintiffs having filed matters in opposition to the pending motions for summary judgment; and the Court, having considered the evidence and matters submitted both in support of and in opposition to the several motions for summary judgment and having read briefs and arguments of counsel, is of the opinion that there are genuine issues as to material facts existing in this cause and that the motions for summary judgment are each to be denied.

It is therefore ORDERED and ADJUDGED by the Court that the Defendants' motions for summary judgment are hereby denied.

DATED: January 6, 1983

/s/ Sam Taylor
Circuit Judge

Defendant's Exhibit 9

IN THE CIRCUIT COURT OF MONTGOMERY
COUNTY, ALABAMA
No. CV-79-179-T
[Caption Omitted]

CONTENTIONS OF DEFENDANTS FIRST ALABAMA BANK OF MONTGOMERY, N.A. and EDWARD HERBERT

1. These defendants were served with the contentions of Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons and the contentions of the Trustee in Bankruptcy for the estate of Parsons Steel Industries, Inc., both of which refer to and incorporate by reference their complaints as amended. Accordingly, these defendants adopt by reference their answers, as amended, to plaintiffs amended complaints, including the admissions, denials, and affirmative defenses contained therein, and their first and second counterclaims, heretofore filed in this action.

2. With respect to the contentions of Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons, these defendants deny that those plaintiffs are entitled to any relief under any theory of recovery, including those described in paragraphs 1, 2, 3, 4, 5, 6 and 7 of their contentions dated January 13, 1983. Further, these defendants deny the factual allegations contained in those contentions.

3. With respect to the statement of contentions of the Trustee in Bankruptcy of the estate of Parsons Steel Industries, Inc., these defendants deny that the Trustee is entitled to any relief under any theory including those described in paragraphs 1 through 21 inclusive, of his contentions dated January 14, 1983. These defendants further deny the factual allegations contained in Trustee's contentions.

4. Plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons have no standing to bring this action and are improper parties to it.

5. This action is barred in its entirety by principles of *res judicata* and collateral estoppel.

6. Plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons cannot maintain an action to recover for alleged injuries to Parsons Steel Industries, Inc.

7. Each and every claim for relief asserted by any or all of the plaintiffs fails to state a claim against these defendants upon which relief can be granted.

8. All plaintiffs are barred by the doctrine of consent because they were willing participants in the acts, omissions or transactions about which they complain.

9. All plaintiffs are barred by the doctrine of estoppel because they were willing participants in the acts, omissions or transactions about which they complain.

10. All plaintiffs are barred by the doctrine of waiver and have waived any right or standing to complain about the acts, omissions or transactions about which they complain.

11. Plaintiff Parsons Steel Industries, Inc. has admitted in writing the falsity of all material and relevant allegations of its complaint and has admitted in writing in a prior action, that it is not entitled to any of the relief sought in this action.

12. Plaintiffs are barred from complaining about the notice of the sale because they executed a post-default waiver of notice.

13. Plaintiffs are barred from complaining about the manner, method, time, price, terms or commercial reasonableness of the sale of the collateral since they consented to it.

14. Without waiving these defendants' contentions that plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons have no standing to bring this action, these defendants contend that the order of March 17, 1982 in this cause precludes or limits any recovery by the plaintiffs.

15. With respect to the defendants' first counterclaim filed March 25, 1982, these defendants contend that Parsons Steel In-

dustries, Inc. executed certain notes in favor of First Alabama Bank of Montgomery, N.A., which notes were personally guaranteed by Jim D. Parsons and Melba L. Parsons, as more particularly identified in the first counterclaim of these defendants, and under the terms of said notes, these defendants are entitled to their costs and legal expenses incurred in any suit connected with the repossession or sale of the collateral securing said notes and that the debtors are liable to the Bank for any deficiency that may arise from sale or disposition of collateral. These defendants contend that under that particular provision of the notes, plaintiffs are liable to these defendants for their attorneys fees and legal costs and expenses arising out of or related to this action, the federal action or the foreclosure and sale of the collateral and related costs and interest; and, further, any recovery by plaintiffs in this action would create a deficiency under the notes which would be owed to and immediately due and payable to these defendants under the notes.

16. With respect to defendants' second counterclaim filed March 25, 1982, these defendants allege that plaintiff Jim D. Parsons, for himself and all other plaintiffs, fraudulently induced these defendants to lend plaintiffs funds by knowingly, intentionally and deceitfully making false statements or reports or willfully overvaluing land, property or security or both, which said fraudulent representations are more particularly described in said second counterclaim. These defendants suffered certain injuries and damages as a proximate result of this fraudulent misconduct by plaintiffs including financial losses on loans to plaintiffs, the costs of defense of this action and the federal action, and the amount of any damages assessed and the financial impact of any relief in this action and all of the damages more particulary described in the first counterclaim, for which these defendants are entitled to recover compensatory and punitive damages, with interest and costs.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: James A. Byram, Jr.

Defendant's Exhibit 10

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-T

[Caption Omitted]

CONTENTIONS OF PARSONS STEEL, INC., JIM D. PARSONS AND MELBA L. PARSONS

Plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons claim compensatory and punitive damages from Defendants First Alabama Bank of Montgomery, Edward Herbert, OSI, Inc., and Michael Orange for injuries these Plaintiffs suffered separate and aside from injury to Plaintiff Parsons Steel Industries, Inc. as a result of the wrongs of Defendants as more particularly set out herein. Parsons Steel, Inc. was the sole stockholder of Industries. Melba L. Parsons and Jim D. Parsons owned ninety-eight (98) shares and one (1) share respectively of the stock of Parsons Steel, Inc. At all times these Plaintiffs were guarantors of the loans from Defendant First Alabama Bank to Parsons Steel Industries.

1. COUNT ONE. Plaintiffs contend that the actions of Defendants as more particularly described in the complaint were done with an actual intent to deceive and injure and damage Plaintiffs and as such were fraudulent. The actions of Defendants were done in bad faith and Plaintiffs relied on the representations and actions of Defendants described to their detriment.

2. COUNT TWO. Plaintiffs contend that under the circumstances existing at the time, as more fully set out in the complaint, Defendants owed a duty to Plaintiffs to safeguard their interest in all transactions involving Defendants acting in concert breached that duty and these Plaintiffs were greatly damaged as a result. By inserting Orange as President and Chief Executive Officer of Subsidiary and thereby injecting themselves into the management of that corporation Defendants Herbert and Bank assumed a fiduciary duty to these Plaintiffs.

3. COUNT SEVEN. Under the circumstances as more fully set out in the complaint Defendant Orange owed a fiduciary duty to these Plaintiffs separate and distinct from the fiduciary duty Orange owed to Industries as its Chief Executive Officer. Through his actions as alleged herein Orange breached that fiduciary duty and these Plaintiffs were damaged as a result.

4. COUNT EIGHT. Plaintiffs contend that Defendants acting in concert participated in a fraudulent conspiracy to accomplish the takeover of Industries for Defendant Orange through Defendant OSI. These Plaintiffs were damaged as a result separate and in addition to the damages suffered by Industries.

5. COUNT NINE. These Plaintiffs contend that the sale of the assets of Industries on or about January 17, 1979 was conducted in a commercially unreasonable method and manner in violation of Alabama law. These Plaintiffs claim damage for injuries suffered as a result of the commercially unreasonable sale separate and in addition to damages suffered by Industries.

6. COUNT TWELVE. Without in any manner limiting their contention that the actions of Defendants as alleged in the complaint amounted to a fraudulent conspiracy through a plan and scheme designed to accomplish the takeover of Industries, these Plaintiffs allege that Defendants made the following specific fraudulent statements with the intent to deceive:

a. Defendant First Alabama Bank by and through its agent, William M. Richardson, stated in September, 1978 that Bank would restructure the then existing debt of Industries and would advance additional funds if Parsons would deposit an additional $100,000.00 of capital into Industries.

b. On or about December 12, 1978 Defendant Herbert, acting as agent for Defendant Bank, promised Plaintiff Jim D. Parsons that First Alabama Bank would make additional loans and advance additional monies to Industries if Parsons would make Orange chief executive officer of Subsidiary and grant him a majority interest in the stock of Subsidiary.

c. On or about December 12, 1978 Defendant Orange stated to Plaintiff Jim D. Parsons that, if Orange's plan to offer the creditors preferred stock did not succeed, he would seek additional loans from First Alabama Bank for Subsidiary.

d. Defendant Bank, through its agents William M. Richardson and Edward Herbert, led Parsons to believe that First Alabama Bank would provide for the continuing financial needs of Industries.

The representations set out above were made by Defendants as a part of the conspiracy to defraud Plaintiffs were false and were made without the intention of performing them at that time and specifically to induce action by these Plaintiffs.

These Plaintiffs, relying on the representations made by Defendants as set out above, acted to their detriment and were damaged as a result.

7. As a result of the wrongs by Defendants as specified herein and in their complaint, as amended, these Plaintiffs claim damages as follows:

a. Parsons Steel Inc. lost real estate with an appraised market value of $1,000,00.00; damage to its business reputation; lost business and sales; lost profits; bad debts; and punitive damages;

b. Plaintiff Jim D. Parsons: loss of job as President of Industries and resulting salary loss; damage to business reputation; mental anguish; and punitive damages;

c. Plaintiff Melba L. Parsons: mental anguish and punitive damages.

Respectfully submitted,

BEASLEY AND WILSON

BY: Frank M. Wilson
Attorneys for Plaintiffs
Parsons Steel, Inc., Jim D. Parsons
and Melba L. Parsons

Defendant's Exhibit 11

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-G

[Caption Omitted]

MOTION OF DEFENDANTS FIRST ALABAMA BANK AND EDWARD HERBERT FOR RECONSIDERATION OF THEIR MOTION AND RENEWED MOTION FOR SUMMARY JUDGMENT

Defendants Bank and Herbert have repeatedly urged the Court in motions and renewed motions for summary judgment that federal litigation, culminating in the decision of the Eleventh Circuit Court of Appeals in *Parsons Steel, Inc. v. First Alabama Bank of Montgomery,* 679 F.2d 242, bars relitigation of the plaintiffs' complaints against Bank and Herbert on principles of *res judicata* and collateral estoppel. For the convenience of the Court, earlier supporting briefs containing, among other things, a paragraph by paragraph comparison of the complaints in the two cases, are attached to this motion.[1]

These earlier motions and briefs demonstrate graphically that the matters now complained of in this Court could have been, but were not, presented to the federal court for determination under a complaint which was in large measure copies word for word from the complaint in this action even down to the relief sought.

Moreover, Bank and Herbert have pointed out the inconsistency of the position of the plaintiffs that Bank's counterclaim is barred by *res judicata* and collateral estoppel because of the identical federal litigation; but that their claims are not so barred.

---

[1] Because all counsel have copies of the earlier briefs which are also on file, they will not be attached to service copies.

Bank and Herbert do not take such an inconsistent position. We urge the Court — as we have repeatedly — to hold that *both* the plaintiffs' claims in their complaint and defendants' claims in their counterclaims are barred by these principles; and that the Court enter summary judgment for Bank and Herbert *and* for the plaintiffs on these principles, thus barring relitigation of *all* matters which could have been, but were not, litigated in the earlier federal action. In this posture, if any party seeks appellate review, the matters can be presented to the Supreme Court of Alabama on a vastly simplified record, and without a long, costly and perhaps unnecessary trial here. Thus the very purpose of the doctrines of *res judicata* and collateral estoppel will have been served, namely, that parties, courts and the judicial system should not have to undergo the unfair and unnecessary burden and expense of relitigating over and over again matters which could have been disposed of in one case.

Band and Herbert respectfully and earnestly join the plaintiffs in requesting the reconsideration of all of these matters.

Respectfully submitted,

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: James A. Byram, Jr.

Attorneys for Defendants

Defendant's Exhibit 12

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-G

[Caption Omitted]

LIST OF DOCUMENTS

The following is a list of documents which defendants First Alabama Bank of Montgomery, N.A. and Edward Herbert anticipate using at the trial of this action. The following are defined terms used herein: defendant, First Alabama Bank of Montgomery, N.A.—"Bank"; Parsons Steel Industries, Inc.—"Subsidiary"; Parsons Steel, Inc.—"Parent"; Standard Machinery Corporation—"SMC"; Standard Building Systems, Inc.—"SBS"; and Orange Steel Industries, Inc.—"OSI". These documents, exhibits, photographs and any demonstrative evidence is available for inspection at the office of Steiner, Crum & Baker, 8th Floor First Alabama Bank Building, Montgomery, AL.

1. Subsidiary notes to Bank:

   a. Note of 6/7/77 for $500,000
   b. Note of 7/31/78 for $239,399
   c. Note of 10/26/78 for $555,000
   d. Security Agreement of 6/7/77.

2. Continuing guaranties of SMC, Parent and Subsidiary to Bank for repayment of Subsidiary debts.

3. Letter of Samuel Kaufman to creditors of Subsidiary, dated December 21, 1978, with attachments.

4. Letter of Ed Herbert to Jim Parsons of January 8, 1979.

5. Letter of Ed Herbert to Jim Parsons of January 15, 1979 giving notice of sale of collateral, along with acknowledgement of receipt of notice and waiver of 5 days notice signed by Jim Parsons.

6. Letter of Edward Herbert to James D. Parsons of January 15, 1979 giving notification of sale of assets on January 17, 1979, with initialed time change and signature of Jim D. Parsons showing notification received.

7. Bill of Sale from Bank to OSI, Inc. of January 17, 1979.

8. Financial statements of Jim Parsons dated August 25, 1975, January 23, 1976, and April, 1978 (attached to counterclaim as Exhibits I, J and K).

9. Note of January 12, 1979 from OSI, Inc. to Bank.

10. Bank's credit file on Subsidiary.

11. Check from Subsidiary to Coggin Agency dated March 6, 1979, written on Exchange Bank Account 01-026-228.

12. State of Alabama individual income tax return, 1978, for Jim D. Parsons and Melba Parsons.

13. U.S. individual income tax return, 1978, for Jim D. Parsons and Melba L. Parsons.

14. Sale of stock agreement made between E.W. Hodge, Mary Jo Hodge and Parent dated 1/26/76.

15. Handwritten statement of Jim Parsons, containing 16 numbered paragraphs, concerning circumstances of Subsidiary financial condition.

16. Option agreement of December 14, 1978.

17. Letter of Michael Orange to Jim Parsons of December 20, 1978 concerning exercise of option agreement.

18. Letter of December 20, 1978 from Luther Waller to Michael Orange concerning exercise of option agreement.

19. Letter of 1/11/79 from Orange to Parsons rescinding option agreement.

20. Subsidiary purchase, sales and receipts register 1978.

21. Subsidiary purchase, sales and receipts register 1978.

22. Parent general ledgers 1977-78, 1978-79, 1979-80, 1980-81, and 1981-82.

23. Parent general journal 1976-77, 1977-78, 1978-79, 1979-80, 1980-81, 1981-82.

24. Parent sales journal 1977-78, 1978-79, 1979-80, 1980-81, and 1981-82.

25. Subsidiary balance sheets

10/31/76	4/30/78
7/31/77	6/30/78
9/30/77	8/31/78
12/31/77	9/30/78
2/28/78	11/30/78
3/31/78	11/30/78
3/31/78 (comparative)	12/31/78

26. Subsidiary accounts payable and receivable schedules for 1978.

27. Subsidiary financial statements

6/23/76
2/24/77
2/24/77
12/31/77
6/30/78

28. Subsidiary adjusting entries 6/31/78 — 12/31/78.

29. Excerpts from payroll register of Subsidiary for 1978, particularly those relating to Melba Parsons, Jim Parsons, Charles Burgess and John Mason. Subsidiary checks to Melba Parsons, 1978.

30. Documents reflecting payment of funds of Subsidiary to E.W. Hodge during 1978 of $100,000, in satisfaction of Parent's obligations under agreement (Item 14).

31. Documents evidencing sales of scrap materials from Subsidiary to Montgomery Iron and Metal Company, Inc. (MIMCO) during the year 1978, totaling approximately $18,641.

32. Balance sheets of Parent from 1976 to 1982.

33. Farley Moody letter of November 15, 1978 to Jim Parsons.

34. Excerpt from Audit and Accounting Guide for Construction Contractors.

35. Document captioned "Parsons Steel Industries Budgeted 1978".

36. Bank's loan review of August, 1978.

37. Newspaper and other articles:

(a) News stories of New York Times News Service and Wall Street Journal of May 28, 1980, and Montgomery Advertiser of April 28, 1980 regarding Chrysler loan guarantee.

(b) Wall Street Journal article of January 9, 1981 regarding Braniff.

38. Certificate issued by Alabama Department of Revenue, reflecting 1978 tax purchase for 1974 Volkswagen; title transfer on 1978 Ford Bronco and 1978 Plymouth Valore.

39. Automobile schedule and change of car coverage schedules for Subsidiary automobile insurance policy no. 10-0644.

40. Subsidiary fixed asset depreciation schedule, 1978.

41. Letters from Subsidiary to creditors, prior to item 3.

42. Letter of 2/7/79 from Hardegree to Beasley.

44. Inventory of Subsidiary, as amended.

45. Corwin appraisal.

46. Lanny Crane exhibits and analysis:

a. Comments regarding adjustments to 11/30/78 financial statement

b. Parent gross sales 10/31/74 - 1981

c. Parent net profit 10/31/74 - 1981

d. Subsidiary comparative financial statement 6/30 & 11/30/78 (balance sheet)

e. Subsidiary comparative financial statement 6/30 & 11/30/78 (income statement)

f. List of questionable payments by Subsidiary

g. Chart of ownership of Subsidiary & Parent

h. Subsidiary:

Accounts payable - 11/30/78
Accounts payable - 10/30/78
Accounts payable - 9/30/78
Accounts payable - 8/30/78

47. Trustee's complaint in bankruptcy Case No. 79-173-N

48. Defendants' interrogatories to plaintiff in bankruptcy case No. 79-173-N.

49. Plaintiff's answers to defendants' interrogatories in bankruptcy case No. 79-173-N.

50. Plaintiff's supplemental answers to defendants' interrogatories in bankruptcy case No. 79-173-N.

51. Comparison of pleadings filed by Trustee for Parsons Steel Montgomery.

52. Transcript of plaintiff's attorney's opening statement in federal case.

53. Comparison of witness lists in federal and state cases.

54. Comparison of paragraphs of complaints in state and federal actions.

55. Complaint in federal action (No. 79-249-N).

56. Amendment to complaint in federal action dated 8/3/79.

57. Transcript of all proceedings in federal action.

58. All depositions taken in both this action and the federal action.

59. Photographs of plant site.

60. Merchants National Bank credit file excerpts on Parent.

dated: 10/19/78.

dated: 10/31/80.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: James A. Byram, Jr.

Defendant's Exhibit 13

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-G

[Caption Omitted]

ALTERNATIVE MOTION TO RECONSIDER OR FOR CONTINUANCE

Defendants First Alabama Bank of Montgomery, N.A. and Edward Herbert move that the Court reconsider its order of January 24, 1983, denying these defendants' motion for summary judgment based on *res judicata;* or in the alternative, to continue the trial of this case, which is set to begin on January 31, 1983, and as grounds for the above, defendants state the following:

1. At approximately 10:15 A.M. today these defendants first learned that plaintiffs were dismissing their action against defendants OSI and Michael Orange, having apparently reached a settlement.

2. One of the primary reasons asserted by plaintiffs to avoid the bar of *res judicata* was the alleged lack of identity of parties in the federal action. Now that the defendants who were not parties to the federal action — Orange and OSI — are no longer parties, the parties are certainly identical and *res judicata* clearly applies to bar this action. Accordingly, these defendants respectfully request this Court to grant their motion for summary judgment. If this motion is granted, any party who wishes to test the *res judicata* defense on appeal may do so without the expense and time required for a trial on the merits. Alternatively, if this Court finds that the *res judicata* defense involves a controlling question of law, this Court may certify an appeal pursuant to Rule 5, A.R.A.P.

3. Crucial witnesses for these defendants' case are Michael Orange, Jessie M. Williams, III, and Henry Hardegree. Since these witnesses were parties and attorneys for parties prior to the events described in paragraph 1, they were not subpoenaed by these defendants because of an agreement with the attorney for Orange and OSI that they would be present and available at trial.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: James A. Byram, Jr.

Defendant's Exhibit 14

IN THE CIRCUIT COURT OF MONTGOMERY
COUNTY, ALABAMA
No. CV-79-179-G
[Caption Omitted]

CROSSCLAIM OF DEFENDANTS BAND AND HERBERT AGAINST OSI, INC. AND MICHAEL ORANGE

Pursuant to Rule 13(g), A.R.C.P., defendants First Alabama Bank of Montgomery ("Bank") and Herbert file this crossclaim against defendants OSI, Inc. and Michael Orange and say as follows:

Bank and Herbert include by reference all complaints and amendments thereto on file in this action; and further say that defendants OSI, Inc. and Orange are liable to Bank and Herbert, as crossclaimants hereunder, for all or part of the claims asserted in this action by plaintiffs against Bank and Herbert.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: James A. Byram, Jr.

Defendant's Exhibit 15

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-G

[Caption Omitted]

RENEWED MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS BANK AND HERBERT

Defendants First Alabama Bank of Montgomery ("Bank") and Herbert move for summary judgment in their favor as to all claims of all plaintiffs made against them in this action, and in support of this motion show the Court that there is no genuine issue as to any material fact relating to the following circumstance, and this circumstance moreover entitles defendants Bank and Herbert to judgmnet of dismissal in their favor:

As affirmatively appears from the stipulation on file by and between plaintiffs and defendants other than Bank and Herbert, said stipulation and proceedings in this Court taken pursuant to it have the effect as a matter of law of barring this action by these plaintiffs against Bank and Herbert, and require a discharge and dismissal of those said claims. *Butler v. GAB Business Services, Inc.*, 416 So.2d 984 (Ala. 1982); *Steenhus v. Holland*, 217 Ala. 105, 115 So.2d 2.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: James A. Byram, Jr.

Defendant's Exhibit 17

IN THE CIRCUIT COURT OF MONTGOMERY
COUNTY, ALABAMA
No. CV-79-179-G
[Caption Omitted]

SECOND AMENDMENT TO ANSWER OF DEFENDANT FIRST ALABAMA BANK OF MONTGOMERY, N.A.

Defendant, First Alabama Bank of Montgomery, N.A., further amend its answer by adding thereto the following:

Twentieth Defense

This action by Plaintiffs against this Defendant is fully barred by virtue of a settlement between the Plaintiffs and Defendants other than Defendants Bank and Herbert.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: James A. Byram, Jr.

Defendant's Exhibit 18

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-G

[Caption Omitted]

SECOND AMENDMENT TO ANSWER OF DEFENDANT EDWARD HERBERT

Defendant, Edward Herbert, further amends his answer by adding thereto the following:

Twentieth Defense

This action by Plaintiffs against this Defendant is fully barred by virtue of a settlement between the Plaintiffs and Defendants other than Defendants Bank and Herbert.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: James A. Byram, Jr.

Defendant's Exhibit 19

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-G

[Caption Omitted]

ANSWER OF FIRST ALABAMA BANK OF MONTGOMERY, N.A.

Comes now defendant First Alabama Bank of Montgomery, N.A. ("Bank"), and in answer to the complaint, as amended, states the following:

I.

First Defense

Plaintiffs Parsons Steel, Inc. ("Parent"), Jim D. Parsons ("Parsons") and Melba L. Parsons have no standing to bring this action and are improper parties to it.

II.

Second Defense

This action is barred in its entirety by principles of res judicata and collateral estoppel.

III.

Third Defense

There is no jurisdiction of the subject matter insofar as the actions of these plaintiffs are concerned in that neither officers, stockholders, nor controlling stockholders, nor a sole stockholder can maintain an action to recover for an injury to the corporation in which the stock is held, even though the value of the stock may be impaired as a result of the injury, and even though the acts complained of may have resulted in damage both to the corporation and the stockholder.

IV.

Fourth Defense

The Complaint, as amended, and each count thereof fails to state a claim upon which relief can be granted.

V.

Fifth Defense

The complaint, as amended, and each count thereof fails to state a claim against this defendant upon which relief can be granted.

VI.

Sixth Defense

With respect to Count One of the complaint, as amended, defendant answers as follows:

A. Defendant denies each and every allegation of paragraphs 9, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, and 38, and specifically denies that plaintiffs are entitled to any relief under this count.

B. Defendant admits the allegations of paragraphs 5, 6, and 25.

C. Defendant is without sufficient knowledge or information to admit or deny the averments of paragraphs 2, 7 and 8.

D. With respect to paragraph 1, defendant is without sufficient knowledge or information to admit or deny that Parsons Steel Industries, Inc. ("Subsidiary") was organized under the laws of the State of Alabama. Defendant specifically denies that after its bankruptcy, Subsidiary had a principal place of business in Montgomery County, Alabama, and avers that Subsidiary has been declared a bankrupt corporation under the Federal Bankruptcy Laws, and its assets are in the possession of its trustee, Pope Gordon.

E. With respect to paragraph 3, defendant is without sufficient knowledge or information to admit or deny the averment that Parsons is a resident citizen of Montgomery County, Alabama. Defendant specifically denies that Parsons was forced to resign as President of Subsidiary; defendant admits that Parsons owned less than five percent of the capital stock of Parsons Steel, but avers that at all material times Parsons misrepresented the extent of his ownership to defendant.

F. With respect to paragraph 4, defendant is without sufficient knowledge or information to admit or deny that Melba Parsons is a resident citizen of Montgomery County, Alabama; defendant admits that at all relevant times Melba Parsons has owned over ninety-five percent of the capital stock of Parsons Steel.

G. With respect to paragraph 10, defendant specifically denies that Subsidiary was a going solvent industrial concern at times relevant to this lawsuit. Defendant is without sufficient knowledge or information to admit or deny the gross sales of Subsidiary.

H. With respect to paragraph 11, defendant is without sufficient knowledge or information to admit or deny the allegations of the first and third sentences of paragraph 11. Defendant admits that Parent owns the common stock of Subsidiary, but specifically denies each and every other aliegation of sentence two.

I. With respect to paragraph 12, defendant admits the allegations of the first sentence and that portion of the second sentence which avers that Subsidiary executed certain Security Agreements to Bank. Each and every other allegation of paragraph 12 is denied.

J. With respect to paragraphs 18 and 19, defendant admits that a letter was sent by attorney Kaufman on behalf of Subsidiary proposing a composition of its creditors, on December

21, 1978. The terms of that letter speak for themselves, and the letter is attached hereto as Exhibit A. Each and every other allegation of paragraphs 18 and 19 is denied.

K. With respect to paragraph 34, defendant admits that the three notes owed by Subsidiary to Bank in November, 1978 were guaranteed as shown in the notes which are attached hereto as Exhibit B, C & D and by the continuing guaranty of Parent up to the amount of $200,000; each and every other allegation of paragraph 34 is denied.

VII.

Seventh Defense

A. With respect to paragraph 1, defendant adopts its answers to paragraph 1 through 38 of Count One of the complaint as amended, as if fully set out herein.

B. Defendant denies each and every allegation of paragraphs 2, 3, and 4 of Count Two and specifically denies that plaintiffs are entitled to any relief under said count.

VIII.

Eighth Defense

With respect to Count Three of the complaint, as amended, defendant answers as follows:

A. With respect to paragraph 1, defendant adopts its answers to paragraphs 1 through 33 of Count Three of the complaint as amended, as if fully set out herein.

B. Defendant denies each and every allegation of paragraphs 2 and 3 of Count Three and specifically denies that defendants are required to account to plaintiffs in any manner.

IX.

Ninth Defense

With respect to Count Four of the complaint, as amended, defendant answers as follows:

A. Defendant denies each and every allegation of paragraph 1, defendant further denies that plaintiffs are entitled to any relief under said Count Four of the complaint as amended.

X.

Tenth Defense

With respect to Count Five of the complaint as amended, defendant answers as follows:

A. Defendant denies each and every allegation of paragraphs 1 and 2 of said Count Five and denies that plaintiffs are entitled to any relief thereunder.

XI.

Eleventh Defense

With respect to Count Six of the complaint, as amended, defendant answers as follows:

A. Defendant denies each and every allegation of paragraph 1 of said Count Six and denies that plaintiffs are entitled to any relief thereunder.

XII.

Twelfth Defense

With respect to Count Eight of the complaint, as amended, defendant answers as follows:

A. With respect to paragraph 1, defendant adopts its answers to paragraphs 1 through 37 of Count One of the complaint as amended, as if fully set out herein.

B. Defendant Denies each and every allegation of paragraphs 2, 3, and 4 of Count Eight and denies that plaintiffs are entitled to any relief thereunder.

COUNTERCLAIM OF DEFENDANT BANK

Comes now defendant and files and asserts the following counterclaim against plaintiffs. Defendant files this counterclaim without waiving any of the separate and several defenses heretofore asserted, including, without limitation, the defense that this Court has no jurisdiction of the subject matter of the action brought by plaintiffs, and that plaintiffs are without standing to assert this action.

First Counterclaim

1. Subsidiary executed the following three notes in favor of Bank: Note of June 7, 1977 in the amount of $500,000; Note of July 31, 1978 in the amount of $239,399; and Note of October 26, 1978 in the amount of $550,000 ("The Notes"). (Attached hereto as Exhibits B, C and D respectively) The note of June 7, 1977 was personally guaranteed by plaintiffs Parsons and Melba Parsons, and the notes of July 31 and October 26, 1978 were personally guaranteed by Parsons. All of Subsidiary's obligations with the Bank were guaranteed by Parent up to an amount of $200,000.

2. As of January 8, 1979 the amount past due and unpaid on The Notes was approximately $1,000,000. In order to recover the sum of money to which it was entitled, it was necessary for defendant to foreclose on the collateral which secured The Notes; and it did so on January 15, 1979 and sold the collateral in satisfaction of the amount due and unpaid on The Notes, with the exception of attorneys fees, on January 17, 1979.

3. The Notes each contain the following provision:

> "In the event of default by Debtor....the proceeds of default sale realized from disposition of collateral may be applied to...Secured Party's reasonable attorney's fees of 15% of the unpaid debt, where the original principal amount or the original amount financed exceeds $300, the legal expenses associated with such sale, or any suit arising

therefrom, or any suit brought to secure recovery of the collateral. . . . Debtor shall be liable to Secured Party for any deficiency that may arise from sale or disposition of collateral."

4. Plaintiffs have brought two lawsuits which arise out of the circumstances of foreclosure specified in paragraph 2 of this Counterclaim—this action and an action brought in the United States District Court for the Middle District of Alabama Northern Division, styled "Parsons Steel, Inc., et al. v. First Alabama Bank of Montgomery, N.A., Civil Action No. 79-249-N" ("Federal Action"). Both actions seek to undo and nullify the payment to defendant of the sums due and unpaid on The Notes in the circumstances described in paragraph 2 of this Counterclaim and are suits arising from the sale of collateral securing the Notes within the meaning of said Notes.

5. Any recovery by plaintiffs or Subsidiary in either action specified in paragraph 4 of this Counterclaim would create a deficiency which would be due and payable to defendant on The Notes; and this Counterclaim asserts a right of recovery against plaintiffs in an amount of any such deficiency.

6. This Counterclaim seeks as well attorneys fees in connection with the default in payment of The Notes—legal expenses incurred because it was necessary for Bank to defend against this action and the federal action in order to collect on the Notes, and which are stipulated in The Notes to be "reasonable" legal expenses associated with the sale of collateral, "or any suit arising therefrom, or any suit brought to secure recovery of the collateral"—in an amount not less than $150,000, and other legal costs and expenses.

WHEREFORE, defendant demands judgment against plaintiffs for deficiency in the amount of its recovery on The Notes arising out of the circumstances specified in paragraph 4 hereinabove; judgment for its attorneys fees and legal costs and expenses arising out of or related to this action, the Federal Ac-

tion, or the foreclosure and sale of the collateral specified hereinabove; and related costs and interest in an amount not less than $150,000 plus costs and interest; and defendant demands such other, further or additional sum, judgment or relief to which it may be entitled.

Second Counterclaim

1. In connection with and for the purpose influencing action in the form of obtaining a loan or loans from defendant (a national banking association the deposits of which at all relevant times were and are insured by the Federal Deposit Insurance Corporation) for himself and for Subsidiary, Parsons, acting on behalf of himself and the other plaintiffs, knowingly made the following false statements or reports, or willfully overvalued land, property or security, or both:

(a) Statements or reports attached hereto as Exhibits E, F, and G recite that Parsons owned nonmarketable securities in the form of 99 shares of Parent of the stated valuation of $163,000, $160,000 and $913,000 respectively, whereas, as shown in his deposition testimony of February 18, 1980 (attached hereto as Exhibit H) Parsons knew these statements to be false, and willfully made such statements regarding this stock ownership. In fact, at the time such false statements were knowingly made, Parsons owned only 1 share of such stock as is admitted in the complaint in this action.

(b) On December 14, 1978 Parsons executed an option agreement with Michael Orange (attached hereto as Exhibit I) in which Parsons knowingly made the false statement or report that he was the owner of 98% of the stock of Parent, whereas, as shown in his said deposition testimony (Exhibit H), Parsons knew this statement to be false and willfully made such false statement regarding this stock ownership. In fact, at the time such false statement was knowingly made, Parsons owned only 1% of such stock.

(c) Parsons willfully made the false statements or reports or willfully overvalued the land, property or security contained in the financial statements attached hereto as Exhibits K and L.

2. At all times material to this Counterclaim, Parsons' said actions or omissions including, without limitation, knowingly false statements or willful overvaluation of land, property or security for the purposes of influencing actions in the form of loans from defendant to Subsidiary, were made and taken on his own behalf as well as on behalf of Subsidiary and the other plaintiffs.

3. Each of these wrongful acts or omissions specified in this Counterclaim constituted knowing or willful violations of 18 U.S.C.A. § 1014, a federal criminal statute. As such this misconduct, proscribed by this federal criminal statute, constitutes actionable common law fraud which entitled defendant to recovery for injury and damages proximately caused by such fraud, and to punitive damages as well. Included, without limitation, among the injuries and damages proximately caused by such fraudulent misconduct on the part of plaintiffs are all financial losses on loans to Subsidiary and Parsons; the costs of defense of this action and the federal action, and the amount of any damages assessed and the financial impact of any relief obtained in these two actions; and all of the damages sought in the First Counterclaim.

WHEREFORE, defendant demands judgment against all plaintiffs for compensatory damages as aforesaid, together with interest and costs of this action, and punitive damages. Defendant also demands such other, further or additional sums, judgment or relief to which it may be entitled.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: Eric G. Bruggink

Attorneys for Defendant First
Alabama Bank of Montgomery N.A.

Defendant's Exhibit 20

IN THE CIRCUIT COURT FOR THE
FIFTEENTH JUDICIAL CIRCUIT
FOR ALABAMA
No. CV-79-179-T
[Caption Omitted]

ORDER

This matter comes before this Court for hearing on Renewed Motion for Summary Judgment of Defendants Bank and Herbert, authorities submitted and after consideration of same, it is

ORDERED, ADJUDGED and DECREED that Defendants Bank and Herbert Renewed Motion for Summary Judgment is hereby DENIED.

DONE this the 31st day of January, 1983.

/s/ Sam W. Taylor - Circuit Judge

Defendant's Exhibit 22

February 9, 1983
Court Met Pursuant to Adjournment
Present the Honorable Sam W. Taylor, Judge Presiding

CV-79-179-T

Parsons Steel Industries, Inc.
Parsons Steel, Inc.
Jim D. Parsons and Melba L. Parsons
and A. Pope Gordon as Trustee for
Parsons Steel Industries, Inc.

vs.

First Alabama Bank of Montgomery,
N. A., Edward Herbert

This day came the parties by their attorneys and issue being joined between the parties, thereupon came a jury of good and lawful persons, to-wit: Sam Barrett and eleven others who having been duly empaneled and sworn according to law upon their oaths do say:

> We, the jury, find for the plaintiff, Jim D. Parsons, and against the defendants and assess the plaintiff's damages at One Million Dollars ($1,000,000.00).
>
> /s/ Sam B. Barrett, Foreman

> We, the jury, find for the plaintiff, Melba L. Parsons, against the defendants and assess the plaintiff's damages at One Million Dollars ($1,000,000.00).

> We, the jury, find for the plaintiff, A. Pope Gordon as trustee for Parsons Steel Industries, Inc. and against the defendants and assess the plaintiff's damages at Two Million Dollars ($2,000,000.00).

> We, the jury, find for the plaintiff, Parsons Steel, Inc. and against the defendants and assess the plaintiff's damages at One Dollar ($1.00).

It is further Considered, Ordered and Adjudged by the Court that judgment be and the same is hereby rendered in favor of the plaintiff, Jim D. Parsons, for $1,000,000.00 dollars; plaintiff, Melba L. Parsons, for $1,000,000.00 dollars; plaintiff, A. Pope Gordon as Trustee for Parsons Steel Industries, Inc., for $2,000,000.00 dollars and for plaintiff, Parsons Steel, Inc., for $1.00 dollar, and that the said plaintiffs have and recover of the defendants, First Alabama Bank of Montgomery, N. A., and Edward Herbert, the said sum of $4,000,001.00, together with the costs in this behalf expended, for all of which let execution issue.

Supreme Court, U.S.
FILED
AUG 7 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 84-1616

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PARSONS STEEL, INC., JIM D. PARSONS and MELBA L. PARSONS, and A. POPE GORDON, Trustee in Bankruptcy for the Estate of PARSONS STEEL INDUSTRIES, INC.,

Petitioners,

vs.

FIRST ALABAMA BANK OF MONTGOMERY, N. A., and EDWARD HERBERT,

Respondents.

JOINT APPENDIX
Volume II

FRANK M. WILSON
BEASLEY and WILSON
418 South Hull Street
Montgomery, AL 36104
(205) 269-2343

Counsel of Record for Petitioners Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons

M. R. NACHMAN
STEINER, CRUM & BAKER
P. O. Box 668
Montgomery, AL 36101
(205) 832-8800

Counsel of Record for Respondents

(Additional Counsel listed inside front cover)

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

Petition for Writ of Certiorari filed April 15, 1985
Certiorari Granted June 24, 1985

40 pp

BEST AVAILABLE COPY

JAMES JERRY WOOD
WOOD and PARNELL
641 South Lawrence Street
Montgomery, AL 36101
(205) 832-4202

Counsel of Record for
Petitioner A. Pope Gordon,
Trustee in Bankruptcy for
the Estate of Parsons
Steel Industries, Inc.

BEST AVAILABLE COPY

INDEX

Page

Volume I:

Chronological List of Relevant Docket Entries 1

Complaint, Filed March 7, 1983 3

Answer of A. Pope Gordon, filed March 17, 1983 106

Answer of Parsons Steel, Inc., et al., filed March 17, 1983 109

Transcript of Proceedings, March 17, 1983 111

Courtroom Deputy's Minutes of Hearing, March 17, 1983 164

Plaintiffs' Exhibit 1 167

Plaintiffs' Exhibit 2 181

Plaintiffs' Exhibit 3 185

Plaintiffs' Exhibit 4 186

Plaintiffs' Exhibit 5 187

Plaintiffs' Exhibit 6 190

Plaintiffs' Exhibit 8 194

Plaintiffs' Exhibit 9 203

Defendants' Exhibit 1 214

Defendants' Exhibit 2 216

Defendants' Exhibit 3 218

Defendants' Exhibit 4 219

Defendants' Exhibit 8 220

Defendants' Exhibit 9 221

Defendants' Exhibit 10 224

Defendants' Exhibit 11 227

Defendants' Exhibit 12 229

Defendants' Exhibit 13 235

Defendants' Exhibit 14 237

Defendants' Exhibit 15 238

Defendants' Exhibit 17 239

Defendants' Exhibit 18 240

Defendants' Exhibit 19 241

Defendants' Exhibit 20 250

Defendants' Exhibit 22 251

Volume II:

Request of Defendant Gordon to take Judicial Notice, Filed March 31, 1983 253

Request of Defendants Parsons and Parsons Steel to Take Judicial Notice, filed March 24, 1983 255

Amendment to Answer by Parsons and Parsons Steel, Filed April 1, 1983 257

Amendment to Answer of Defendant Gordon, filed April 5, 1983 258

Defendants' Supplementation to Request to Take Judicial Notice, Filed May 2, 1983 259

Opinion of District Court, Filed June 15, 1983 ..... *Petition for Certiorari p. A-31*

Motion to Supplement Record on Appeal, Filed July 14, 1983 305

Order of Court of Appeals Granting Motion To Supplement Record, Filed August 1, 1983 307

Opinion of Court of Appeals, Filed December 4, 1984 .... *Petition for Certiorari p. A-1*

Trustee's Statement of Claim, Filed February 26, 1985 . 307

Plaintiffs' Response to Trustee's Statement of Claim, Filed _____ 327

District Court Opinion and Order, Filed March 29, 1985 344

District Court Order Filed May 21, 1985 354

Trustee's Notice of Appeal, Filed May 28, 1985 357

Portions of the Proceedings in Parsons Steel, et al. v. First Alabama Bank of Montgomery, Case Number 79-249-N:

District Court Order Denying Motion for Summary Judgment 358

Excerpts from Deposition of Jimmy Douglas Parsons, February, 18, 1980 368

Excerpts from Deposition of Jimmy Douglas Parsons, March 7, 1980 370

Excerpts from Deposition of Jimmy Douglas Parsons, October 9, 1979 372

Excerpts from Deposition of Melba Parsons, February 18, 1980 374

Excerpts from Deposition of Michael Orange, January 22, 1980 376

Excerpts from Deposition of E. W. Hodge, October 9, 1979 378

Excerpts from Deposition of Luther Waller, January 28, 1980 380

Excerpts from Deposition of Samuel Kauffman, January 21, 1980 382

Excerpts from Deposition of William E. Epperson, January 21, 1980 384

Excerpts from Deposition of William M. Jordan, Jr., January 21, 1980 386

Excerpts from Deposition of James S. Gaskell, Jr., January 21, 1980 388

Excerpts from Deposition of Charles M. Hines, January 21, 1980 390

Excerpts from Deposition of Thomas R. Peacock, January 21, 1980 392

Excerpts from Deposition of J. Allen Reynolds, January 21, 1980 394

Excerpts from Deposition of Paul E. Norris, January 21, 1980 396

Excerpts from the Court's Opening Charge to the Jury 398

Excerpts from Opening Argument of Plaintiffs ... 401

Excerpts from Opening Argument of Defendants . 407

Excerpts from the Testimony of Edmond W. Hodge 410

Excerpts from the Testimony of Jimmy Douglas Parsons 413

Excerpts from the Testimony of June Neely Williams..... 435

Excerpts from the Testimony of William Richardson 439

Excerpts from the Testimony of Edward Herbert .. 455

Excerpts from the Testimony of Michael Orange .. 441

Excerpts from Plaintiffs' Closing Argument 456

Excerpts from Defendants' Closing Argument 466

Excerpts from Plaintiffs' Final Closing Argument . 469

Excerpts from the Court's Oral Charge 469

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

REQUEST THAT THE COURT TAKE JUDICIAL NOTICE OF PLEADINGS

COMES NOW, Defendant A. Pope Gordon, Trustee in Bankruptcy for the Estate of Parsons Steel Industries, Inc., and pursuant to the stipulation entered into among the parties and approved by the Court, requests that the Court take judicial notice of the following evidence in consideration of the Plaintiffs' Application for injunction:

1. All of the pleadings, briefs, orders, petitions, and matters of record filed with the United States Bankruptcy Court for the Middle District of Alabama in the case of *In re: Parsons Steel Industries, Inc., a bankrupt corporation,* Docket No. 79-173.

2. The order of the Circuit Court of Montgomery County, Alabama in the case of *Parsons Steel Industries, Inc., et al. v. First Alabama Bank of Montgomery, et al.* joining the Trustee in Bankruptcy, A. Pope Gordon, as a Party Plaintiff, in the above-styled action. A copy of said Order is attached hereto as Exhibit "A".

Respectfully submitted,

/s/ James Jerry Wood

/s/ Thomas R. Debray

Attorneys for A. Pope Gordon,
Trustee in Bankruptcy

EXHIBIT "A"

ORDER

The Court having read and considered the renewed motion to dismiss filed by Defendant First Alabama Bank of Montgomery, N.A., it is ORDERED that the trustee in bankruptcy for Parson Steel Industries, A. Pope Gordon, be joined as a party plaintiff to this action and that a copy of this Order be mailed to the trustee and his counsel, Honorable James Jerry Wood.

It is further ORDERED that the renewed motion to dismiss is in all other respects due to be, and the same is, hereby DENIED.

DONE and ORDERED this the 12th day of December, 1979.

/s/ William R. Gordon
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

REQUEST THAT THE COURT TAKE JUDICIAL NOTICE OF EVIDENCE

Comes now Defendants Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons and pursuant to the stipulation entered into among the parties and approved by the Court request that the Court take judicial notice of the following evidence in consideration of the Plaintiffs' application for injunction:

1. The following matters from *Parsons Steel Inc., et al. v. First Alabama Bank of Montgomery,* Case Number 79-249-N, United States District Court for the Middle District of Alabama:

a. Defendant's motion to dismiss filed June 18, 1979;

b. Defendant's motion to dismiss or alternatively motion for summary judgment filed August 6, 1979;

c. Defendant's motion for partial summary judgment filed September 19, 1979;

d. Defendant's renewed motion for summary judgment filed January 29, 1979;

e. Defendant's motion for reconsideration of Court's order of 5/30/80 filed June 19, 1980;

f. Defendant's answer to complaint as amended and counterclaim filed June 26, 1980;

g. Order on pretrial hearing filed December 17, 1980;

h. Order amending the pretrial order filed December 24, 1980;

i. Defendant's motion for directed verdict filed March 17, 1981;

j. Defendant's motion for directed verdict filed March 19, 1981;

k. Defendant's motion to vacate and dismiss for absence of subject matter jurisdiction filed March 24, 1981;

2. The following matters *In Re: Parsons Steel Industries, Inc., A Bankrupt Corporation,* Docket Number 79-173, United States Bankruptcy Court for the Middle District of Alabama:

a. Order of April 5, 1979, adjudicating Parsons Steel Industries, Inc. a bankrupt;

b. Order of May 7, 1979 appointing Trustee;

c. Order on Trustee's application to employ an attorney dated June 19, 1979;

d. Order relieving Trustee's attorney and appointing another in his place dated July 27, 1979;

e. Petition for permission to pursue litigation filed November 27, 1979;

f. Order authorizing Trustee to pursue litigation dated December 5, 1979;

g. Complaint of Pope Gordon, as Trustee, against Parsons Steel Inc., Melba L. Parsons and Jim D. Parsons filed March 19, 1981.

BEASLEY AND WILSON

BY: /s/ Frank M. Wilson

Attorney for Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

AMENDMENT TO ANSWER OF DEFENDANT PARSONS STEEL INC., JIM D. PARSONS AND MELBA L. PARSONS

Come now the Defendants Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons and amend their answer heretofore filed by adding the following:

TENTH DEFENSE

Plaintiffs are estopped from seeking the relief sought in their complaint due to their having taken inconsistent positions heretofore, i.e., having argued at all stages of the Federal litigation that the court lacked jurisdiction of that claim.

ELEVENTH DEFENSE

Plaintiffs are barred from obtaining the relief sought in their complaint by the doctrine of the doctrine of Collateral Estoppel in that the issue of whether the state action is barred by principles of res judicata or collateral estoppel has been fully litigated in the state action and a final judgment rendered.

BEASLEY AND WILSON

BY: Frank M. Wilson

Attorneys for Parsons Steel, Inc.,
Jim D. Parsons and Melba L.
Parsons

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

AMENDMENT TO ANSWER OF A. POPE GORDON, TRUSTEE IN BANKRUPTCY FOR THE ESTATE OF PARSONS STEEL INDUSTRIES, INC.

COMES NOW A. Pope Gordon, Trustee in Bankruptcy for the Estate of Parsons Steel Industries, Inc., and hereby amends its Answer heretofore filed in the above-styled cause as follows:

FIRST DEFENSE

Plaintiffs are estopped from seeking the relief sought in their complaint due to their having taken inconsistent positions heretofore, i.e., having argued at all stages of the Federal litigation that the Court lacked jurisdiction of that claim.

SECOND DEFENSE

Plaintiffs are barred from obtaining the relief sought in their complaint by the doctrine of the doctrine of Collateral Estoppel in that the issue of whether the State action is barred by principles of *res judicata* or collateral estoppel has been fully litigated in the state action and a final judgment rendered.

Respectfully submitted,

/s/ James Jerry Wood

/s/ Thomas R. DeBray

Attorneys for Trustee

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

SUPPLEMENTATION TO REQUEST THAT THE COURT TAKE JUDICIAL NOTICE OF EVIDENCE

Come now Defendants Parsons Steel, Inc., Jim D. Parsons, and Melba L. Parsons and pursuant to the stipulation entered into among the parties and approved by the Court supplements its request that the court take judicial notice of evidence by attaching hereto a copy of the various pleadings and orders from the related cases.

BEASLEY AND WILSON

BY: FRANK M. WILSON
Attorneys for Defendants

FRANK M. WILSON
P.O. Box 4537
Montgomery, Alabama 36101

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-249-N
[Caption Omitted]

MOTION TO DISMISS

Comes defendant, First Alabama Bank of Montgomery, N.A., a national banking association (hereinafter "Bank"), and moves the Court to dismiss this action on the following grounds:

1. There is no jurisdiction of the subject matter.

2. There is no jurisdiction of the subject matter in that federal courts do not have subject matter jurisdiction of suits involving

national banks merely because such banks are federally chartered.

3. There is no jurisdiction of the subject matter in that this action is plainly not one within the scope and meaning of 12 U.S.C.A. §§ 1972 and 1975 — parts of the Bank Holding Company Amendments of 1970 which forbid tie-ins and tying arrangements in specified circumstances, and which are in all relevant respects similar and analogous to provisions of the federal antitrust laws relating to impermissible tying arrangements.

4. Plaintiffs have no standing to bring this action, and are improper parties-plaintiff to it since they have suffered no injury to their business or property by reason of anything forbidden in the antitrust laws.

5. Plaintiffs have no standing to bring this action, and are improper parties-plaintiff to it since they have suffered no injury to their business or property by reason of anything forbidden in 12 U.S.C.A. § 1972.

6. Defendant assigns the foregoing grounds on the basis that neither officers, nor stockholders, nor controlling stockholders nor a sole stockholder can maintain an action to recover for an injury to the corporation in which the stock is held, even though the value of the stock may be impaired as a result of the injury, and even though the acts complained of may have resulted in damage both to the corporation and to the stockholder.

7. The complaint fails to state a claim upon which relief can be granted.

8. There is an entire absence of federal jurisdiction over this attempted action.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

Attorneys for Defendant
First Alabama Bank
of Montgomery, N.A.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-249-N
[Caption Omitted]

DEFENDANT'S MOTION TO DISMISS OR ALTERNATIVELY MOTION FOR SUMMARY JUDGMENT

Comes defendant, First Alabama Bank of Montgomery, N.A., a national banking association (hereinafter "Bank"), and moves the Court to dismiss this action on the following grounds:

1. There is no jurisdiction of the subject matter.

2. There is no jurisdiction of the subject matter in that federal courts do not have subject matter jurisdiction of suits involving national banks merely because such banks are federally chartered.

3. There is no jurisdiction of the subject matter in that this action is plainly not one within the scope and meaning of 12 U.S.C.A. §§ 1972 and 1975 — parts of the Bank Holding Company Amendments of 1970 which forbid tie-ins and tying arrangements in specified circumstances, and which are in all relevant respects similar and analogous to provisions of the federal antitrust laws relating to impermissible tying arrangements.

4. Plaintiffs have no standing to bring this action, and are improper parties-plaintiff to it since they have suffered no injury to their business or property by reason of anything forbidden in the antitrust laws.

5. Plaintiffs have no standing to bring this action, and are improper parties-plaintiff to it since they have suffered no injury to their business or property by reason of anything forbidden in 12 U.S.C.A. § 1972.

6. Defendant assigns the foregoing grounds on the basis that neither officers, nor stockholders, nor controlling stockholders nor a sole stockholder can maintain an action to recover for an injury to the corporation in which the stock is held, even though the value of the stock may be impaired as a result of the injury, and even though the acts complained of may have resulted in damage both to the corporation and to the stockholder.

7. The complaint fails to state a claim upon which relief can be granted.

8. In support of this motion, defendant attaches hereto as a part hereof the affidavit of Edward Herbert and all exhibits thereof.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

Attorneys for Defendant
First Alabama Bank
of Montgomery, N.A.

MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant, First Alabama Bank of Montgomery, N.A., hereinafter Bank, upon the basis of this Court's Order of August 24, 1979; of Bank's Motion for Summary Judgment of August 6, 1979 (and attached exhibits); the response of Plaintiffs (and attached exhibits); and of all of the pleadings on file, moves for a Partial Summary Judgment specifying that the only material issue of fact for trial is

> "whether the Defendant required the Plaintiffs to allow a customer of the Defendant to control Parsons Steel in connection with the making of loans to Parsons Steel"

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-249-N
[Caption Omitted]

DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT

Defendant, First Alabama Bank of Montgomery, N.A. (hereafter "Bank") moves the Court as follows:

To enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in Bank's favor dismissing the entire action with prejudice, on the ground that there is no genuine issue as to any material fact and that Bank is entitled to judgment as a matter of law.

This motion is based upon:

1. The pleadings on file in this case.

2. Plaintiffs' interrogatories to Bank and Bank's answers thereto.

3. The affidavit of Edward Herbert of August 3, 1979.

4. The deposition of Edward Herbert of October 8, 1979.

5. Plaintiffs' requests for admission and Bank's responses thereto.

6. The depositions of E. W. Hodge, Joseph M. Cherry, June Neely and Jim D. Parsons of October 9, 1979; James S. Gaskell, Jr., Thomas Peacock, Sam Kaufman, Paul Norris, William Epperson, J. Allen Reynolds, William B. Jordan of January 21, 1980; Michael Orange of January 22, 1980; and William Richardson, Luther Waller, Charles Brightwell and George Goodwyn of January 28, 1980.

7. This Court's order of August 24, 1979.

8. Such further supplemental materials as Bank may desire, in which event Bank will furnish plaintiffs with copies thereof prior to the hearing of this motion.

WHEREFORE, defendant moves to this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in its favor on the ground that the foregoing specified pleadings, depositions, affidavit, interrogatories and answers thereto, requests for admission and responses thereto and this Court's order of August 24, 1979 show that there is no genuine issue as to any material fact, and that Bank is entitled to judgment as a matter of law.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

Attorneys for Defendant
First Alabama Bank
of Montgomery

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-249-N
[Caption Omitted]

MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANT'S ALTERNATIVE MOTION FOR DISMISSAL OR FOR SUMMARY JUDGMENT

Defendant respectfully moves that this Court reconsider its order of May 30, 1980 in the above entitled action which denied defendant's alternative motion for dismissal or summary judgment (hereinafter "Defendant's Motion). As grounds defendant assigns the following:

1. Foremost among the grounds assigned in its alternative motion for dismissal of this action was an absence of subject matter jurisdiction, asserted under Rule 12(b) (1), F.R.C.P. Defendant's Motion, asserting such an absence of subject matter jurisdiction, was based upon the extensive factual materials specified in the motion. Plaintiffs, upon whom rests the burden of proving the existence of subject matter jurisdiction asserted under the Bank Holding Company Act Amendments, 12 U.S.C.A. §§ 197' 1978, submitted other materials.

2. This Court, in denying Defendant's Motion, applied an impermissible test, namely, the question of whether a genuine issue of fact existed; specifically declined to decide the factual issues relating to its subject matter jurisdiction; incorrectly held that inferences were to be indulged in favor of plaintiff, when, indeed, the burden of proof of subject matter jurisdiction was and is upon plaintiffs; and impermissibly made no decision, and expressed no opinion, "on the probative value or weight to be given any of the evidence submitted by either party at this stage of this proceeding." (n. 2, p. 9) In so doing, this Court impermissibly departed from a "first principle of federal jurisdiction" that "[i]t is is incumbent on a court of the United States, whether trial or appellate, to dismiss an action whenever it appears that subject matter jurisdiction is lacking, and the

court must do so sua sponte if the parties have not brought the issue to the attention of the court." *Marshall v. Gibson's Products, Inc.*, 584 F.2d 668, 671-672 (5th Cir. 1979).

3. Thus, this court impermissibly departed from the well established principle that a challenge to subject matter jurisdiction shifts the burden to a plaintiff to prove that jurisdiction exists; that the submission of matters outside the pleadings on the question of subject matter jurisdiction does not convert a 12 (b) (1) question to a Rule 56 question of simply whether a genuine issue of fact exists; and from the principle that, on the contrary, it is incumbent upon a district court to determine whether it has jurisdiction, and in the process to resolve questions of fact, in recognition of the further principle that proof of jurisdiction is on the plaintiff. *Gilbert v. David,* 235 U.S. 561, 566-568 (1915); *Save Our Cemeteries, Inc. v. Archdiocese of New Orleans, Inc.*, 568 F.2d 1074, 1076 (5th Cir. 1978); and *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416, 418 (5th Cir. 1972).

In the words of the Supreme Court, *Thomson v. Gaskill,* 315 U.S. 442, 446:

> "[I]f a plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff bears the burden of supporting the allegations by competent proof. (Cit.) the bill must be dismissed if the evidence in the record does not support the allegations as to jurisdictional amount."

Accordingly, it is respectfully requested that this Court reconsider and withdraw its order of May 30, 1980; that is resolve the factual issues relating to the subject matter jurisdiction of this Court; and that it conclude that there is no subject matter jurisdiction because of patent inapplicability of the federal statute upon which jurisdiction is asserted, 12 U.S.C.A. §§ 1971-1978; and that it dismiss this action for want of subject matter jurisdiction.

Respectfully submitted,

STEINER, CRUM & BAKER

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-249-N
[Caption Omitted]

ANSWER AND COUNTERCLAIM

Comes defendant, First Alabama Bank of Montgomery, N.A., and answers the Complaint as Amended ("the Complaint") as follows:

First Defense

1. There is no jurisdiction of the subject matter.

2. There is no jurisdiction of the subject matter in that this action is not one within the scope and meaning of 12 USCA §§ 1972 and 1975 — parts of the Bank Holding Company Act Amendments of 1970 ("BHCA"), which forbid tie-ins and tying arrangements in specified circumstances, and which are in all relevant aspects similar and analogous to provisions of the federal antitrust laws relating to impermissible tying arrangements.

3. Plaintiffs have no standing to bring this action and are improper parties-plaintiff to it since they have suffered no injury to their business or property by reason of anything forbidden by the BHCA or by the antitrust laws.

4. The complaint fails to state a claim upon which relief can be granted.

Second Defense

1. Defendant admits the allegations of paragraphs 2 and 5 of the Complaint.

2. Defendant denies each and every allegation of paragraphs 1, 9, 10, 13, 14, 15, 16, 20, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39 and 40 (and all of its subparagraphs) of the Complaint.

3. In answer to paragraph 3 of the Complaint, sentence 1 is admitted; the allegations of sentence 2 are denied; defendant does not have sufficient knowledge or information to form a belief as to the truth of the allegations of sentence 3.

4. In answer to paragraphs 4, 6, 11 and 22 of the Complaint defendant does not have sufficient knowledge or information to form a belief as to the truth of these paragraphs.

5. In answer to paragraph 7 of the Complaint sentence 1 is admitted, and each allegation of sentence 2 is denied.

6. In answer to paragraph 8 of the Complaint defendant admits it made certain loans to Parsons Steel Industries, Inc. (hereafter "Subsidiary") during and prior to 1978, and that Parsons Steel, Inc., (hereafter "Parent") was required to sign a guaranty agreement up to $200,000. All other allegations of this paragraph are denied.

7. In answer to paragraph 12 of the Complaint, the 1st, 2nd and 5th sentences are admitted, except that the last such loan was made on October 26, 1978. All other allegations of prargraph 12 are denied.

8. In answer to paragraphs 17 and 18 of the Complaint, defendant admits that a letter was sent to creditors by attorney Kaufman, dated December 21, 1978 (copies of which are parts of numerous affidavits and depositions already on file), the content and meaning of which are contained in that letter. All other allegations of these paragraphs are denied.

9. Defendant denies each and every allegation of paragraph 19 of the Complaint, except that defendant admits that "a relatively small number of the creditors of Subsidiary" accepted the proposal contained in the Kaufman letter.

10. In answer to paragraph 21 of the Complaint, defendant denies all of the allegations of this paragraph. For further answer defendant appends as Exhibit A its notification of foreclosure of January 8, 1979.

11. In answer to paragraphs 23 and 24 of the Complaint, defendant attaches as Exhibits B, C and D documents which accurately describe the circumstances of foreclosure and sale, and the waiver and consent entered thereon. Defendant denies all other allegations of these paragraphs.

12. In answer to paragraph 26 of the Complaint, defendant admits that the relationship between Herbert and defendant was that of agent and principal. Defendant denies all other allegations of paragraph 26.

13. In answer to paragraph 36 of the Complaint, defendant admits that on January 12, 1979, defendant loaned the sum shown in the note attached as Exhibit E on the security shown therein. Defendant denies all other allegations of paragraph 36.

14. Defendant denies that plaintiffs are entitled to the relief sought.

Third Defense

Plaintiffs are estopped to bring this action, in that prior to the commencement of this lawsuit, plaintiffs took positions, upon which defendant relied, directly contrary to the positions they are asserting in this action. Specifically, but without limiting the generality of this defense, plaintiffs took the position that Michael Orange was acceptable as manager of Subsidiary; that they were in agreement with the attempted creditor composition represented by the Kaufman letter of December 21, 1978; that they had no objection to defendant's foreclosure on collateral securing Subsidiary's notes with defendant, and the sale of that collateral to OSI, Inc. at the price for which it was sold; and that they voluntarily sold the Montgomery real estate of Parent and Subsidiary to OSI, Inc.

Fourth Defense

Plaintiffs are barred from bringing this action in that they consented to each act by defendant of which they complain. Specifically, but without limiting the generality of this defense,

plaintiffs voluntarily entered into an option agreement with Michael Orange in which management of Subsidiary was turned over to Orange and Orange was given an option to purchase stock of Subsidiary; plaintiffs consented to the terms of the proposed creditor composition; they consented to foreclosure by Bank on the collateral securing Subsidiary's notes with Bank; they waived delay of sale of that collateral; they consented to sale of that collateral to OSI, Inc. and to the sales price; and consented to sale of the Montgomery real estate of Parent and Subsidiary to OSI, Inc. and to the sales price.

Fifth Defense

Plaintiffs fraudulently induced Bank to lend moneys to Subsidiary based upon false financial statements made on their behalf by plaintiff Jim D. Parsons (hereafter "Parsons"), as is set out in further detail in defendants Second Counterclaim below.

COUNTERCLAIM OF DEFENDANT

COMES NOW defendant and files and asserts the following Counterclaim against plaintiffs. Defendant files this Counterclaim without waiving any of the separate and several defenses heretofore asserted, including, without limitation, the defense that this Court has no jurisdiction of the subject matter of the action brought by plaintiffs.

First Counterclaim

1. Subsidiary executed the following three notes in favor of Bank: Note of June 7, 1977 in the amount of $500,000; Note of July 31, 1978 in the amount of $239,399; and Note of October 26, 1978 in the amount of $550,000. (hereafter, "the notes") These notes are attached hereto as Exhibits F, G and H, respectively. The note of June 7, 1977 was personally guaranteed by plaintiffs Parsons and Melba Parsons, and the notes of July 31 and October 26, 1978 were personally guaranteed by Parsons. All of Subsidiary's obligations with the Bank were guaranteed by Parent up to an amount of $200,000.

2. As of January 8, 1979 the amount past due and unpaid on the notes was approximately $1,000,000. In order to recover from plaintiff and Subsidiary the sum of money to which it was entitled, it was necessary for defendant to foreclose on the collateral which secured the notes; and it did so on January 15, 1979 and sold the collateral in satisfaction of the amount due and unpaid on the notes, with the exception of attorneys fees, on January 17, 1979.

3. The notes each contain the following provision:

> "In the event of default by Debtor . . . the proceeds of default sale realized from disposition of collateral may be applied to . . . Secured Party's reasonable attorney's fees of 15% of the unpaid debt, where the original principal amount or the original amount financed exceeds $300, and legal expenses associated with such sale, or any suit arising therefrom, or any suit brought to secure recovery of the collateral . . . Debtor shall be liable to Secured Party for any deficiency that may arise from sale or disposition of collateral."

4. Plaintiff and Subsidiary have brought two lawsuits which arise out of the circumstances of foreclosure specified in paragraph 2 of this Counterclaim — this action and an action brought in the Circuit Court of Montgomery County, Alabama, styled Parsons Steel Industries, Inc., et al. vs. First Alabama Bank of Montgomery, N.A., et al., Civil Action No. CV-79-179-G (hereafter "state action"). Both actions seek to undo and nullify the payment to defendant of the sums due and unpaid on the notes in the circumstances described in paragraph 2 of this Counterclaim. The state action seeks as well a recovery back of the collateral sold by defendant.

5. Any recovery by plaintiffs or Subsidiary in either action specified in paragraph 4 of this Counterclaim would create a deficiency which would be due and payable to defendant on the notes; and this Counterclaim asserts a right of recovery against plaintiffs in an amount of any such deficiency.

6. This Counterclaim seeks as well attorneys fees in connection with the default in payment of the notes — legal expenses stipulated in the notes to be "reasonable" legal expenses associated with the sale of collateral, "or any suit arising therefrom, or any suit brought to secure recovery of the collateral" — in an amount not less than $150,000, and other legal costs and expenses.

WHEREFORE, defendant demands judgment against plaintiffs for any deficiency in the amount of its recovery on the notes arising out of the circumstances specified in paragraph 4 hereinabove; judgment for its attorneys fees and legal costs and expenses arising out of or related to this action, the state action, or the foreclosure and sale of the collateral specified hereinabove; and related costs and interest in an amount not less than $150,000 plus costs and interest; and defendant demands such other, further or additional sum, judgment or relief to which it may be entitled.

Second Counterclaim

1. In connection with and for the purpose of influencing action in the form of obtaining a loan or loans from defendant (a national banking association the deposits of which at all relevant times were and are insured by the Federal Deposit Insurance Corporation) for himself and for Subsidiary, Parsons, acting on behalf of himself and the other plaintiffs, knowingly made the following false statements or reports, or willfully overvalued land, property or security, or both:

(a) Statement or reports attached hereto as Exhibits I, J and K recite that Parsons owned nonmarketable securities in the form of 99 shares of Parsons Steel, Inc. ("Parent") of the stated valuation of $163,900, $160,000 and $913,000 respectively, whereas, as shown in his deposition testimony of February 18, 1980 (attached hereto as Exhibit L) Parsons knew these statements to be false, and willfully made such false statements regarding this stock ownership. In fact, at the time such false

statements were knowingly made, Parsons owned only 1 share of such stock.

(b) On December 14, 1978 Parsons executed an option agreement with Michael Orange (attached hereto as Exhibit M) in which Parsons knowingly made the false statement or report that he was the owner of 98% of the stock of Parsons Steel, Inc. ("Parent"), whereas, as shown in his said deposition testimony (Exhibit L), Parsons knew this statement to be false and willfully made such false statement regarding this stock ownership. In fact, at the time such false statement was knowingly made, Parsons owned only 1% of such stock.

(c) Parsons willfully made the false statements or reports or willfully overvalued the land, property or security contained in the financial statements attached hereto as Exhibits N and O.

2. At all times material to this Counterclaim, Parsons' said actions or omissions including, without limitation, knowing false statements or willful overvaluation of land, property or security for the purposes of influencing actions in the form of loans from defendant to Subsidiary, were made and taken on his own behalf as well as on behalf of Subsidiary and the other plaintiffs.

Each of these wrongful acts or omissions specified in this Counterclaim constituted knowing or willful violations of 18 USCA § 1014, a federal criminal statute. As such this misconduct, proscribed by this federal criminal statute, constitutes actionable common law fraud which entitles defendant to recovery for injury and damages proximately caused by such fraud, and to punitive damages as well. Included, without limitation, among the injuries and damages proximately caused by such fraudulent misconduct on the part of plaintiffs are all financial losses on loans to Subsidiary and Parsons; the costs of defense of this action and the state action, and the amount of any damages assessed and the financial impact of any relief ob-

tained in these two actions; and all of the damages sought in the First Counterclaim.

WHEREFORE, defendant demands judgment against plaintiffs for compensatory damages as aforesaid, together with interest and costs of this action, and punitive damages. Defendant also demands such other, further or additional sums, judgment or relief to which it may be entitled.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: Eric G. Bruggink

Attorneys for Defendant
First Alabama Bank
of Montgomery, N.A.

P.O. Box 668
Montgomery, Alabama 36101

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-249-N
[Caption Omitted]

ORDER ON PRETRIAL HEARING

This cause coming on to be heard on a regular pretrial hearing and all parties being present in person or by counsel, the following action was thereupon taken:

1. The following pleadings and amendments were allowed:

(a) Complaint;

(b) Amendment to Complaint;

(c) Answer to Complaint as Amended of Defendant;

(d) Counterclaim of Defendant; and

(e) Answer of Plaintiff to Counterclaim.

2. Parties plaintiff:

(a) Parsons Steel, Inc., is a corporation organized and existing under the laws of the State of Alabama, with its principal place of business in Mobile County, Alabama.

(b) Jim D. Parsons and Melba L. Parsons are resident citizens of Mobile County, Alabama.

3. Party defendant:

First Alabama Bank of Montgomery, N.A. (hereafter "Bank"), is a national banking association organized and existing under the laws of the United States, having its principal place of business in Montgomery, Alabama.

4. Jurisdiction: Plaintiffs contend that jurisdiction is conferred on this Court by 12 U.S.C.A .§ 1971, et seq., the Bank Holding Company Act Amendments of 1970 ("BHCA").

Defendant has asserted through repeated motions to dismiss and for summary judgment that no subject matter jurisdiction exists.

5. Statement of Plaintiffs Case:

6. Statement of Defendant's Case:

(a) *Defenses.* In addition to the general denial, defendant asserts the following defenses:

(1) No Federal Jurisdiction. There is no federal subject matter jurisdiction in that this action is plainly not within the scope and meaning of the BHCA, which forbids tie-ins and tying arrangements in specified circumstances. There was no extension of credit within the meaning of BHCA. Plaintiffs put forward a proposal for a general creditor composition under the terms of which Subsidiary's loans with Bank would be restructured to permit delayed repayment of principal at reduced interest rates, and under which plaintiffs would agree to a change in management of Subsidiary. Bank's only agreement was that it would accept such a proposal if the proposal was also accepted by other creditors. Such an agreement does not consititute an extension of credit within the meaning of the BHCA.

Even assuming arguendo that there had been an extension of credit, the condition for restructuring — a change in management — was not an additional property or service to Bank other than that "usually provided in connection with a loan", within the meaning of the BHCA.

An additonal jurisdictional deficiency is the lack of actual damages. Under the BHCA, by analogy to related antitrust statutes, proof of actual damages is an element of the cause of action. There have been no such damages.

(2) Standing. Plaintiff have no standing to bring this action and are improper parties plaintiff to it since they have suffered no injury to their business or property by reason

of anything forbidden by the BHCA or by related antitrust laws.

(3) Estoppel. Plaintiffs are estopped to bring this action, in that prior to the commencement of this lawsuit plaintiffs took positions, upon which defendant relied, directly contrary to the positions they are asserting in this action.

(4) Consent. Plaintiffs are barred from bringing this action in that they consented to each act by defendant of which they complain.

(5) Fraud. Plaintiffs fraudulently induced Bank to lend monies to Subsidiary based upon false financial statements made on their behalf by plaintiff Jim D. Parsons.

(b) *Counterclaims.*

(1) First counterclaim. Subsidiary executed three notes to Bank in a total amount of $1,289,399. These notes were guaranteed in whole or in part by plaintiffs. Upon default Bank foreclosed on the collateral securing these notes and sold the collateral in satisfaction of the amount due and unpaid, with the exception of attorneys expenses. Each of these notes contains a provision permitting an offset against the recovery from the sale of collateral for an attorney's fee of fifteen (15%) percent of the unpaid debt, plus legal expenses associated with any suit arising from such sale. Plaintiffs and subsidiary have brought two lawsuits arising out of the circumstances of foreclosure — this action and an action brought in the Circuit Court of Montgomery County, Alabama. Both actions seek to undo the foreclosure sale, and seek compensatory and punitive damages. To the extent that these suits are successful they would create a deficiency on Subsidiary's notes which defendant would be entitled to recover from plaintiffs as guarantors.

In this counterclaim defendant seeks to recover for attorney's expenses in an amount not less than 15 percent of the unpaid balance and expenses to date arising out of the foreclosure sale and subsequent lawsuits in the amount of $28,639.50. This amount will be subject to increase as the two lawsuits continue. In addition, of the total amount of the unpaid debt of subsidiary assumed after foreclosure by Orange Steel Industries, Inc. — $1,300,000 — Bank has been required by the comptroller of the currency to charge off as an asset, but nevertheless a debt subject to collection, the amount of $624,750.00 which creates a deficiency of subsidiary's notes with Bank.

(2) Second Counterclaim. Bank extended loans to subsidiary in reliance upon representations made to Bank by subsidiary and Jim Parsons that Parsons owned 99 percent of the stock in Plaintiff, Parsons Steel, Inc., and on reports stating the financial condition of subsidiary. These representations were false and known to be false in that Plaintiff, Jim Parsons, did not in fact own 99 shares of Parsons Steel, Inc., and in that the value of the land, property and securities contained in financial statements of subsidiary was willfully over-valued. In reliance on these false representations, the Bank extended loans to the subsidiary which were subsequently defaulted upon and which default resulted in the injuries and damages set out in defendant's second counterclaim.

7. It is ORDERED by this Court that:

(a) All discovery on questions of liability, except "Standing" as discussed herein in Paragraph 6(a) (2), shall be completed on or before March 2, 1981.

(b) Issues of liability of defendant other than "Standing" will be tried separate from issues of damages and liability on the counterclaim before the same jury.

(c) The parties shall, no later than February 16, 1981, exchange lists stating the names and addresses of all witnesses whom they expect to offer at trial and summaries of the expected testimony of any expert witness. Such lists shall also identify any depositions that a party expects to use. Unless specifically agreed between the parties or allowed by the Court for good cause shown, the parties shall be precluded from calling a witness not so listed. Except to the extent written notice to the contrary is given prior to the date of the trial, each party shall be deemed to have agreed that the conditions of Rule 32 (a) (3), Federal Rules of Civil Procedure, are satisfied with respect to the deposition of any person identified in the list as one whose testimony is expected to be offered by deposition.

(d) The parties shall, on or before February 16, 1981, exchange lists describing all exhibits which they may utilize at trial. Unless specifically agreed between the parties or allowed by the Court for good cause shown, the parties shall be precluded from offering in evidence any exhibit not so identified. Each party shall make such exhibits available for inspection and copying. Except to the extent written notice to the contrary is given by March 2, 1981, the evidence shall be deemed admissible.

8. If is further ORDERED by this Court that all of the above-named allowances and agreements be, and the same are hereby, binding upon all parties in the above-styled cause unless this Order be hereafter modified by order of the Court.

DONE this 17th day of December, 1980.

R. E. Varner

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-249-N
[Caption Omitted]

ORDER

It is ORDERED by this Court that the Pretrial Order filed herein December 17, 1980, be, and the same is hereby, amended by adding the following to Paragraph 5, on Page 2, of said Order:

"5. Statement of Plaintiffs' Case: A. The Plaintiffs contend that the Defendant, a national banking association, violated Title 12, U.S.C. § 1972, by placing certain requirements on Plaintiffs — the Defendant's customers — as conditions to making additional loans and extending credit to Parsons Steel Industries, Inc. These conditions were not of such nature as to be usually provided to a bank by a customer in connection with a loan. The specific conditions placed on Plaintiffs consisted of requiring (1) a change in the management of Parsons Steel Industries, Inc., and (2) the sale or agreement to sell a majority of the capital stock of said corporation to Michael Orange, a third party secured by the Defendant and unknown to the Plaintiffs. Defendant gave Plaintiffs no choice but to accept these conditons or face the certainty of no additional loans to Parsons Steel Industries, Inc. Plaintiffs were at the time customers of Defendant for the purposes of 12 U.S.C. §§ 1971, *et seq.*, and specifically §§ 1972 and 1975.

B. Plaintiffs contend that, as a result of the Defendant's violation of 12 U.S.C. § 1972, they were injured and damaged in their business and property and are, therefore, entitled to recover three times the amount of their damage, pursuant to 12 U.S.C. § 1975 and the cost of this action, including a reasonable attorney's fee.

C. Plaintiffs claim as their damages (1) injury to their general reputation in the business community; (2) a loss of earnings by Parsons Steel, Inc.; (3) a loss by Parsons Steel, Inc., of the value of its stock in Parsons Steel Industries, Inc.; (4) a loss of real estate by Parsons Steel, Inc., valued at $1,003,000.00; (5) the loss of his job by Jim D. Parsons resulting in a loss of income; (6) Melba L. Parsons' stock was impaired and greatly decreased in value; (7) each individual Plaintiff was caused to suffer great worry, stress and mental anguish; (8) their costs of this action; and (9) a reasonable attorney's fee.

D. Plaintiffs' contentions as to Defendant's Counterclaims: 1. *First Counterclaim:* The Plaintiffs deny that they are indebted to the Defendant and deny that the provision quoted in ¶ 3 of the First Counterclaim applies to the circumstances of this litigation or that the Defendant is entitled by reason thereof to recover any amount against the Plaintiffs. Plaintiffs contend that there is no deficiency balance on any loan from the Defendant. The Plaintiffs specifically contend that the Defendant is limited to recovering, if anything, its actual payments for attorneys' fees arising out of the foreclosure.

2. *Second Counterclaim:* Plaintiffs contend that this counterclaim is barred by the statute of limitations. Plaintiffs further deny the material allegations of the Second Counterclaim and deny that they are indebted to the Defendant in any amount. Plaintiffs further contend that the Defendant has suffered no damage as the result of any action alleged in its Second Counterclaim. The Plaintiffs further contend that any of the damages claimed by the Defendant were proximately caused, not by any actions of Plaintiffs, but by the Defendant's violation of federal and State law as alleged in Plaintiffs' complaint. Plaintiffs deny that they are liable to Defendant in any amount for any of the matters alleged in the Second Counterclaim. Plaintiffs contend that the Defendant's prior actions estop it from recovery under the Second Counterclaim."

Apparent factual statements hereinabove are the Plaintiffs' contentions.

DONE this 24th day of December, 1980.

R. E. Varner

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-249-N
[Caption Omitted]

MOTION FOR DIRECTED VERDICT

Defendant, pursuant to Rule 50 F.R.C.P., moves that the Court direct a verdict in its favor and specifies as grounds therefor the following:

1. The evidence is insufficient to warrant a finding that defendant was guilty of any violation of those parts of the Bank Holding Amendments of 1970, 12 U.S.C.A. §§ 1972, et seq., upon which the complaint in this action is based (hereafter "BHCA").

2. The evidence is insufficient to warrant a finding that defendant was guilty of violating any of the relevant provisions of BHCA which were intended to and do forbid tie-ins and tying arrangements in circumstances and in all respects similar and analogous to provisions of the federal antitrust laws relating to impermissible tying arrangements.

3. The evidence is insufficient to warrant a finding that defendant was guilty of violating any of the relevant provisions of BHCA which were intended to and do prohibit anti-competitive practices which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire.

4. The evidence is insufficient to warrant a finding that defendant was guilty of violating any of the relevant provisions of BHCA which were not intended to and do not interfere with the conduct of appropriate traditional bank practices.

5. The evidence is insufficient to warrant a finding that defendant was guilty of violating any of the relevant provisions of

BHCA which were intended to and do guard against unfair competition and misuse of economic power of the kind also made impermissible under the federal antitrust laws.

6. The evidence is insufficient to warrant a finding that plaintiffs, or any of them, have shown by substantial evidence any injury to their business or property by reason of anything forbidden in BHCA.

7. The evidence is insufficient to warrant a finding that defendant was guilty of any violation of BHCA and, on the contrary, there is no substantial evidence to show that any act or omission of bank was anything other than a permissible attempt, in accordance with appropriate, traditional and sound banking practices, to protect its investments.

8. The evidence is insufficient to warrant a finding that defendant ever extended credit or set any conditions in connection with a loan within the meaning of BHCA.

9. The evidence is insufficient to warrant a finding that defendant ever extended credit or set any conditions in connection with a loan within the meaning of BHCA. On the contrary, the evidence is insufficient to show that defendant ever contemplated a loan to any subsidiary of plaintiff, Parsons Steel, Inc.; and the evidence is insufficient to warrant a finding that any loan negotiations ever reached the point of even an oral agreement concerning any phase of a formal loan agreement.

10. The evidence does not warrant a finding that defendant ever imposed, or sought to impose, any condition for the making of a loan or extension of credit which was prohibited, as a tying arrangement, by BHCA.

11. The evidence is insufficient to warrant a finding that any act or omission of defendant complained of in this case conferred any economic benefit or competitive advantage on defendant as it must for there to be a violation of BHCA.

12. The evidence is insufficient to warrant a finding that any plaintiff has standing to sue under BHCA.

13. The evidence is insufficient to warrant a finding that any plaintiff has standing to sue under BHCA, since stockholders cannot maintain an action under BHCA to redress an alleged injury to a corporation in which they own stock or which is a subsidiary of a corporation in which they own stock.

14. The evidence is insufficient to warrant a finding that defendant's acts or omissions were the types of tying arrangements prohibited and made impermissible by BHCA, or that defendant's acts or omissions were inappropriate, nontraditional (and thus impermissible) banking practices.

15. The evidence compels a finding that plaintiffs bear equal responsibility for the creation of and their participation in the acts, omissions or plans which they now contend violate BHCA, and that plaintiffs were full, willing and knowledgeable participants in such plans, acts or omissions.

The foregoing specified grounds, separately and severally, entitle defendant to a directed verdict in accordance with the teachings and principles set down in *Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373, 1382-85 (5th Cir. 1979).

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: Eric G. Bruggink

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-249-N
[Caption Omitted]

MOTION FOR DIRECTED VERDICT

Defendant, pursuant to Rule 50 F.R.C.P., moves that the Court direct a verdict in its favor and specifies as grounds therefor the following:

1. The evidence is insufficient to warrant a finding that defendant was guilty of any violation of those parts of the Bank Holding Amendments of 1970, 12 U.S.C.A. §§ 1972, et seq., upon which the complaint in this action is based (hereafter "BHCA").

2. The evidence is insufficient to warrant a finding that defendant was guilty of violating any of the relevant provisions of BHCA which were intended to and do forbid tie-ins and tying arrangements in circumstances and in all respects similar and analogous to provisions of the federal antitrust laws relating to impermissible tying arrangements.

3. The evidence is insufficient to warrant a finding that defendant was guilty of violating any of the relevant provisions of BHCA which were intended to and do prohibit anti-competitive practices which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire.

4. The evidence is insufficient to warrant a finding that defendant was guilty of violating any of the relevant provisions of BHCA which were not intended to and do not interfere with the conduct of appropriate traditional bank practices.

5. The evidence is insufficient to warrant a finding that defendant was guilty of violating any of the relevant provisions of

BHCA which were intended to and do guard against unfair competition and misuse of economic power of the kind also made impermissible under the federal antitrust laws.

6. The evidence is insufficient to warrant a finding that plaintiffs, or any of them, have shown by substantial evidence any injury to their business or property by reason of anything forbidden in BHCA.

7. The evidence is insufficient to warrant a finding that defendant was guilty of any violation of BHCA and, on the contrary, there is no substantial evidence to show that any act or omission of bank was anything other than a permissible attempt, in accordance with appropriate, traditional and sound banking practices, to protect its investments.

8. The evidence is insufficient to warrant a finding that defendant ever extended credit or set any conditions in connection with a loan within the meaning of BHCA.

9. The evidence is insufficient to warrant a finding that defendant ever extended credit or set any conditions in connection with a loan within the meaning of BHCA. On the contrary, the evidence is insufficient to show that defendant ever contemplated a loan to any subsidiary of plaintiff, Parsons Steel, Inc.; and the evidence is insufficient to warrant a finding that any loan negotiations ever reached the point of even an oral agreement concerning any phase of a formal loan agreement.

10. The evidence does not warrant a finding that defendant ever imposed, or sought to impose, any condition for the making of a loan or extension of credit which was prohibited, as a tying arrangement, by BHCA.

11. The evidence is insufficient to warrant a finding that any act or omission of defendant complained of in this case conferred any economic benefit or competitive advantage on defendant as it must for there to be a violation of BHCA.

12. The evidence is insufficient to warrant a finding that any plaintiff has standing to sue under BHCA.

13. The evidence is insufficient to warrant a finding that any plaintiff has standing to sue under BHCA, since stockholders cannot maintain an action under BHCA to redress an alleged injury to a corporation in which they own stock or which is a subsidiary of a corporation in which they own stock.

14. The evidence is insufficient to warrant a finding that defendant's acts or omissions were the types of tying arrangements prohibited and made impermissible by BHCA, or that defendant's acts or omissions were inappropriate, nontraditional (and thus impermissible) banking practices.

15. The evidence compels a finding that plaintiffs bear equal responsibility for the creation of and their participation in the acts, omissions or plans which they now contend violate BHCA, and that plaintiffs were full, willing and knowledgeable participants in such plans, acts or omissions.

The foregoing specified grounds, separately and severally, entitle defendant to a directed verdict in accordance with the teachings and principles set down in *Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373, 1382-85 (5th Cir. 1979).

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: Eric G. Bruggink

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-249-N
[Caption Omitted]

MOTION OF DEFENDANT TO VACATE AND DISMISS FOR ABSENCE OF SUBJECT MATTER JURISDICTION

Defendant moves the Court to vacate the jury verdict of March 19, 1981; to abstain from entering any judgment thereon; and to dismiss this action, all for the reason, as repeatedly asserted by defendant throughout the course of this litigation, that there is no jurisdiction of the subject matter.

It is axiomatic that a district court may inquire into the basis of its subject matter jurisdiction at any stage of the proceedings;[1] and entry of a judgment would be a wrongful extension of federal jurisdiction, conferring upon district courts power the Congress has denied them.[2]

Plaintiffs seek to base federal jurisdiction *solely* on the Bank Holding Company Act Amendments of 1970, 12 U.S.C.A. §§ 1971-78 (hereafter, "BHCA"). The facts have been fully developed in trial. It now remains for this Court — and only this Court — to determine whether plaintiffs have sustained their burden of proving federal jurisdiction under that statute.

This Court is the sole trier of fact on the issue of subject matter jurisdiction. It must resolve all factual issues crucial to a determination of its subject matter jurisdiction; and presumptions are *not* with plaintiffs, who have the burden of proof of

---

[1] *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980).

[2] *American Fire and Cas. Co. v. Finn*, 341 U.S. 6, 17-18; *Marshall v. Gibson's Products of Plano*, 584 F.2d 668 (5th Cir. 1978).

federal jurisdiction. Federal courts have an obligation, even on their own motion, if necessary, to dismiss an action whenever it becomes apparent that there is an absence of federal subject matter jurisdiction. *American Fire & Cas. Co. v. Finn,* 341 U.S. 6, 17-18; *Marshall v. Gibson's Products of Plano,* 584 F.2d 668 (5th Cir. 1978). This deficiency may be raised at any time. Rule 12(h) (3), F.R.C.P.

When subject matter jurisdiction is challenged, the burden shifts to the plaintiff to prove that jurisdiction exists. *Thompson v. Gaskill,* 315 U.S. 442, 446; *Menchaca v. Chrysler Credit Corp., supra.,* at 512; *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.,* 469 F.2d 416, 418 (5th Cir. 1972); *Save Our Cemeteries, Inc. v. Archdioses of New Orleans, Inc.,* 568 F.2d 1074, 1076 (5th Cir. 1978).

The Court, and not a jury, must weigh and decide any factual issue involved in a challenge to federal subject matter jurisdiction. *Gilbert v. David,* 235 U.S. 561, 566-68. *See* 5 Wright & Miller, *Federal Practice & Procedure,* § 1350 p. 556-58. The Fifth Circuit made this plain in Rosemound:

> "Rosemound urges that it was denied its Seventh Amendment right to a trial by jury because of the trial judge's decision on the jurisdictional question. The short answer is that there has been no denial of this right because questions of jurisdiction are properly within the ambit of the Court's authority."

The Court, in resolving disputed questions of fact in the course of determining whether plaintiffs have met their burden of proving subject matter jurisdiction, may and should resolve those questions for itself — and decide in the process what weight and credibility to give to the testimony of any party or witness. *Gilbert v. David,* 235 U.S. 561, 566-68; *Wetmore v. Rymer,* 169 U.S. 115, 120-21; *Land v. Dollar,* 330 U.S. 731, 735-6, n. 4; *Menchaca v. Chrysler Credit Corp., supra.*;

Williamson v. Tucker, 632 F.2d 579, 588 (5th Cir. 1980);[3] and *Mortensen v. First Federal S & L,* 549 F.2d 884, 891-892 (3rd Cir. 1977).

Finally, it is respectfully submitted that this Court should now decide for itself on the basis of all of the evidence whether it has subject matter jurisdiction under BHCA, that is to say whether there was an extension of credit within the meaning of that act; and whether, even if there was, any act or omission of defendant constituted a prohibited tying arrangement within its meaning.[4]

Accordingly, defendant moves that this Court vacate the jury verdict of March 19, 1981; abstain from entering judgment thereon; and dismiss this action — all because of absence of federal subject matter jurisdiction.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: Eric G. Bruggink

---

[3] "Jurisdictional issues are for the court — not a jury — to decide, whether they hinge on legal or factual determinations. (Cit.) The unique power of district courts to make factual findings which are decisive of jurisdiction is, therefore, not disputed."

[4] Obviously defendant does not abandon its earlier arguments that plaintiffs have no standing to sue — also a matter of subject matter jurisdiction.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

In re
Parsons Steel Industries, Inc.

Bankruptcy No. 79-173-N

ADJUDICATION

On consideration of the petition filed on March 5, 1979, it is adjudged that Parsons Steel Industries, Inc. is a bankrupt.

Dated: April 5, 1979

Rodney R. Steele

Bankruptcy Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

In re
Parsons Steel Industries, Inc.
Route 6, Box 43
Montgomery, Alabama 36108

Bankruptcy No. 79-173-N

ORDER APPROVING ELECTION OF TRUSTEE OR APPOINTING TRUSTEE AND FIXING THE AMOUNT OF HIS BOND

(1) A. Pope Gordon of P.O. Box 4414, Montgomery, Alabama 36101, is hereby approved as the elected [*or* is hereby appointed] trustee of the estate of the above-named bankrupt.

(2) The amount of the bond of the trustee is fixed at $40,000.00

Dated: May 7, 1979

Rodney R. Steele

Bankruptcy Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-173-N
[Caption Omitted]

ORDER ON TRUSTEE'S APPLICATION TO EMPLOY AN ATTORNEY

The Trustee in this case filed an application on June 4, 1979, seeking to have this Court appoint Jere L. Beasley as his attorney for the purpose of prosecuting a certain lawsuit against certain named persons, principally the First Alabama Bank of Montgomery, and Mr. Herbert, one of its officers, and against one Michael Orange and others relating to the alleged foreclosure and re-sale of certain property of this Bankrupt immediately prior to bankruptcy.

It now appears that Jere L. Beasley, by virtue of his representation of Parsons Steel, Incorporated, a Mobile corporation and Mr. Jim Parsons, individually, may have some conflict of interest, in the prosecution of the suit on behalf of Trustee as well as in the prosecution of a suit filed by Mr. Beasley on behalf of Parsons Steel and Jim D. Parsons, individually against the same or some of the same defendants.

The Court concludes that it would be in the best interest of this estate not to appoint Mr. Jere L. Beasley.

Trustee now seeks to have the Court to appoint in the stead of Mr. Beasley Honorable George B. Azar, attorney at law, Montgomery, and the Court concludes that Mr. Azar is eminently qualified to pursue the cause of action filed against the above named defendants and other causes of action which may arise in favor of this estate. No conflict appears in the appointment of Mr. Azar as attorney for the Trustee.

It is therefore ORDERED that upon the application of Trustee for authority to employ an attorney, the Trustee is hereby authorized to employ Honorable George B. Azar as attorney for the prosecution of suits against the First Alabama Bank of Montgomery, Mr. Herbert of that bank, Mr. Michael Orange, and other defendants, and upon the execution of the appropriate affidavit by Mr. Azar, this Order will be deemed to constitute an appointment of Mr. Azar as the attorney for Trustee.

Dated at Montgomery, Alabama this 19th day of June, 1979.

Rodney R. Steele

Bankruptcy Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-173-N
[Caption Omitted]

ORDER RELIEVING TRUSTEE'S ATTORNEY AND APPOINTING ANOTHER IN HIS PLACE

On July 26, 1979, the Honorable George B. Azar who was appointed as attorney for the Trustee in this case, on June 19, 1979, notified the Court that he had been made aware of a clear conflict involving his representation of the Trustee and the representation by his law firm through another member of that law firm of the First Alabama Bank of Montgomery, N.A., a party adversary to the Bankrupt, in proceedings now pending.

Mr. Azar seeks to be relieved of his duties as attorney for Trustee, and the Court concludes that his Motion is well taken.

It is therefore ORDERED that the Honorable George B. Azar is hereby relieved of his duties as attorney for the Trustee in this cause.

The Trustee on the same day filed an application for the appointment of Honorable James Jerry Wood, attorney at law, of Montgomery, Alabama, as his attorney for the prosecution of certain suits or causes of action against the First Alabama Bank of Montgomery, and others. No conflict or adverse interest appear in the appointment of Mr. Wood and the Court concludes that he ought to be appointed at Trustee's request to represent him.

It is therefore

ORDERED that the Honorable James Jerry Wood is hereby appointed as the attorney for the Trustee for the prosecution of certain causes of action including causes of action against the First Alabama Bank of Montgomery, N.A.

Dated at Montgomery, Alabama this 27th day of July, 1979.

Rodney R. Steele

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-173-N
[Caption Omitted]

PETITION

COMES NOW James Jerry Wood, the attorney for the Trustee, Pope Gordon, in the above-styled case, and petitions this Honorable Court for permission to pursue litigation pending in the Circuit Court of Montgomery County pursuant to 11 U.S.C. §541.

There is pending before the Honorable William Gordon Civil Action No. CV-79-179-G, Parsons Steel Industries, et al., Plaintiffs, vs. First Alabama Bank of Montgomery, N.A., et al., Defendants, a case which was instituted by the Bankrupt-Debtor prior to bankruptcy. The case involves the commercial reasonableness of the levy and foreclosure on assets of Parsons Steel Industries, Inc. by the First Alabama bank prior to bankruptcy. Further it concerns whether the First Alabama Bank of Montgomery improperly used "insider financial information" furnished by the debtor and whether the bank foreclosed on Parsons Steel Industries, Inc. assets and sold them for a value less than the fair market value of these assets.

DATED this 27th day of November, 1979.

James Jerry Wood

Attorney for Trustee

IN THE UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA
No. 79-173-N
[Caption Omitted]

ORDER AUTHORIZING TRUSTEE TO PURSUE LITIGATION

On November 27, 1979, the attorney for the Trustee in this case filed a Petition for permission to pursue litigation pending in the Circuit Court of Montgomery County, Alabama, pursuant to the Bankruptcy Act.

The litigation which he intends to pursue is Civil Action No. CV-79-179-G, styled Parsons Steel Industries, et al., Plaintiffs, vs. First Alabama Bank of Montgomery, N.A., et al., Defendants.

The Court is satisfied that the cause of action above styled is an asset of this estate, which it is in the best interest of the creditors to pursue, and that the Trustee ought to be authorized to prosecute that cause of action.

It is therefore ORDERED that the Trustee be and he is hereby authorized, through his attorney, James Jerry Wood, to prosecute the above styled cause of action, and to make report at the appropriate time concerning the outcome of such civil action.

Dated at Montgomery, Alabama this 5th day of December, 1979.

Rodney R. Steele

Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 79-173-N
[Caption Omitted]

COMPLAINT

TO THE HONORABLE RODNEY R. STEELE, BANKRUPTCY JUDGE:

The Plaintiff Pope Gordon, as trustee of the estate of Parsons Steel Industries, Inc., a corporation, a bankrupt, respectfully represents as follows:

(1) Plaintiff is Pope Gordon, the duly appointed Trustee in the estate of Parsons Steel Industries, Inc., a corporation, a bankrupt.

(2) Defendants are Parsons Steel, Inc., a corporation, Jimmy Douglas Parsons, an individual, Melba L. Parsons, an individual and Joe L. Cherry, an individual. Parsons Steel, Inc., a corporation, is a duly organized and existing corporation organized and incorporated under the laws of the State of Alabama. Parsons Steel, Inc., a corporation, was the "parent" company of Parsons Steel Industries, Inc., a corporation, the bankrupt in the case, and owned all the outstanding shares of stock in the bankrupt. Jimmy Douglas Parsons is an individual over the age of nineteen (19) years believed to be residing at Irvington, Mobile, Alabama. Mr. Parsons was formerly the President of Parsons Steel Industries, Inc., a corporation, the bankrupt. Melba L. Parsons is an individual over the age of nineteen (19) years believed to be residing at Irvington, Mobile, Alabama. She was formerly the Secretary-Treasurer of Parsons Steel Industries, Inc., a corporation, the bankrupt herein and is the majority stockholder of Parsons Steel, Inc.. Joe L. Cherry is an individual over the age of nineteen (19) years believed to be residing in Mobile, Alabama. Mr. Cherry is believed to be now and has been in the past the President of Parsons Steel, Inc., a corporation, one of the defendants herein.

(3) Plaintiff-trustee is seeking herein to recover monies and property of the bankrupt estate of Parsons Steel Industries, Inc., a corporation, from the defendants herein.

(4) On to-wit: March 6, 1979, defendant Jimmy Douglas Parsons executed and delivered to the Coggin Agency a check drawn on the bank account of Parsons Steel Industries, Inc., a corporation, at Exchange National Bank of Montgomery. A copy of the check is attached hereto as Exhibit "A". This check was paid to Pat Coggins, a real estate agent in Mobile, Alabama, as a binder or down payment for a home for defendants Jimmy D. Parsons and Melba L. Parsons which they purchased together taking title jointly with right of survivorship. Said home is presently being occupied by defendants Jimmy Parsons and Melba Parsons and is in Irvington in Mobile County, Alabama. At the time of the execution of the check, Parsons Steel Industries, Inc., a corporation, was insolvent and defendants Jimmy D. Parsons and Melba Parsons knew it was insolvent. The expenditure of the funds was not for a legitimate corporate purpose, but rather for the personal benefit of the defendants Jimmy D. Parsons and Melba Parsons. Plaintiff prays the Court will order said defendants to return said sum of money plus interest immediately, and will give plaintiff a judgment against each of them, separately and severally in the amount of Five Thousand and no/100 ($5000.00) Dollars plus interest.

(5) During calendar year 1978 Defendant Melba Parsons was paid a total of Ten Thousand and no/100 ($10,000.00) Dollars in salary by Parsons Steel Industries, Inc., a corporation, your bankrupt. Defendant did nothing to earn this money and by her own admission did not work for the bankrupt that year, did not perform any services whatsoever. Defendant Melba Parsons knew or should have known when this money was paid to her that Parsons Steel Industries, Inc., a corporation was insolvent. Plaintiff prays the Court will order defendant Melba Parsons to return to plaintiff the said sum of money paid to her for her work, labor and services never rendered by her, immediately, and further plaintiff prays this Court will give plaintiff a judg-

ment against defendant Melba Parsons in the amount of Ten Thousand and no/100 ($10,000.00) Dollars plus interest since the money was paid to her.

(6) Plaintiff would show this Court that on December 31, 1978, at a time when Parsons Steel Industries, Inc., a corporation, was insolvent, defendant Jimmy D. Parsons was paid a bonus of Ten Thousand and no/100 ($10,000.00) Dollars. Plaintiff would allege this is an unwarranted transfer of monies of Parsons Steel Industries, Inc., which should belong to this estate. Said bonus was used by defendant Jimmy D. Parsons to purchase two (2) automobiles and one (1) dictating machine from Parsons Steel Industries, Inc. Plaintiff believes the bonus paid to Parsons was nothing more than a paper transaction between defendant Jimmy D. Parsons and an insolvent Parsons Steel Industries, Inc. to accomplish the transfer to defendant Jimmy D. Parsons the automobiles and dictating equipment belonging to Parsons Steel Industries, Inc. The automobiles "purchased" by defendant Jimmy D. Parsons or transferred to him are one (1) Volkswagen Model 1811 Thing automobile, VIN#1842219993 and one (1) 19_____ Lincoln Mark IV automobile, VIN#_____. Plaintiff prays this Court will order defendant Jimmy D. Parsons to return this bonus to this estate, and will grant plaintiff a judgment in the sum of Ten Thousand and no/100 ($10,000.00) Dollars plus interest since the money was paid to him.

(7) During calendar year 1978 Parsons Steel Industries, Inc., while insolvent, paid the insurance premiums on automobiles owned by defendant Jimmy D. Parsons. Plaintiff prays this Court will order said defendant to make an accounting of all such funds paid to or for the benefit of defendant for car insurance premiums on automobiles owned by him or defendant Melba Parsons by Parsons Steel Industries, Inc., and will order said defendants to repay to this estate all such funds. Plaintiff further prays this Court will grant plaintiff a judgment against defendants Jimmy D. Parsons and Melba Parsons as their liability appears including interest.

(8) On to-wit: March 8, 1979 defendant Jimmy D. Parsons negotiated a settlement of an account or contract right belonging to Parsons Steel Industries, Inc. Specifically, defendant Jimmy D. Parsons, as President of Parsons Steel Industries, Inc., settled an account or claim of Parsons Steel Industries, Inc. with P. A. Arnold Construction Company, Inc. for the sum of Eight Thousand Three Hundred and Thirty Four ($8334.00) Dollars. A copy of a release document defendant Jimmy D. Parsons signed is attached hereto as Exhibit "B". Plaintiff believes defendant Jimmy D. Parsons converted said sum of money to his own use. Plaintiff would show the Court that the money paid to settle the account was never deposited in any bank account of Parsons Steel Industries, Inc. Plaintiff prays this Court will order defendant Jimmy D. Parsons to return said sum to this estate to whom it rightfully belongs immediately, and that this Court will grant plaintiff a judgment against defendant Jimmy D. Parsons in the sum of Eight Thousand Three Hundred Thirty Four ($8334.00) Dollars plus interest since March 8, 1979.

(9) During calendar year 1978 and during other calendar years Parsons Steel Industries, Inc., a corporation, sold scrap metal from time to time. The income accounts for the company for 1978 do not reflect any income received by Parsons Steel Industries, Inc. for the sale of scrap. Plaintiff is aware that a company in the Montgomery, Alabama area, namely MIMCO, has records indicating it purchased from Parsons Steel Industries, Inc. scrap steel and metal for which it paid a total of Eighteen Thousand Eight Hundred Ninety Four and 68/100 ($18,894.68) Dollars. Plaintiff cannot find where any of this money was ever received by Parsons Steel Industries, Inc., and plaintiff believes that defendant Jimmy D. Parsons converted said funds and possibly others to his own use. Plaintiff prays this Court will order defendant Jimmy D. Parsons to make an accounting of all funds received by him for the sale of scrap belonging to Parsons Steel Industries, Inc., and will order him to return that money plus interest immediately. Plaintiff prays this Court will grant

plaintiff a judgment against defendant Jimmy D. Parsons for the total sum received by him for the sale of scrap plus interest.

(10) On to-wit: June 12, 1978, Parsons Steel Industries, Inc., a corporation, sold or transferred to defendant Joe L. Cherry a metal building which was the property of Parsons Steel Industries, Inc. Cherry, who was then President of defendant Parsons Steel, Inc., a corporation, agreed to pay the company the sum of Sixteen Thousand Three Hundred Fifty Four and 40/100 ($16,354.40) Dollars for the building. On September 31, 1978 when Parsons Steel Industries, Inc. was insolvent and less than three (3) months after the "sale" of the building to defendant Cherry, the debt was entered on the books of Parsons Steel Industries, Inc. as a bad debt write-off, and in essence the debt was forgiven. Wherefore Plaintiff prays this Court will grant plaintiff a judgment against defendant Joe L. Cherry in the sum of Sixteen Thousand Three Hundred Fifty Four and 40/100 ($16,354.40) Dollars plus interest, or the true value of the building, whichever sum is greater.

(11) The records and ledgers of Parsons Steel Industries, Inc. show that on December 31, 1978 defendant Parsons Steel, Inc., a corporation, owed this estate a sizeable debt which plaintiff believes amounts to Two Hundred Six Thousand Five Hundred Seventy Seven and 77/100 ($206,577.77) Dollars. Said money has not been paid and is still due by Parsons Steel, Inc. Of this amount, One Hundred Thousand ($100,000.00) Dollars represents amounts paid by Parsons Steel Industries, Inc. to Mr. E. W. Hodge to reduce the debt defendant Parsons Steel, Inc. owed him for the purchase of the company and assets which came to be Parsons Steel Industries, Inc. In addition, Parsons Steel Industries, Inc., at a time when it was insolvent, paid One Hundred Fifty Four Thousand Eight Hundred Eight and 96/100 ($154,808.96) Dollars on August 30, 1978, to a trade creditor of defendant Parsons Steel, Inc. Wherefore plaintiff prays this Court will grant plaintiff a judgment against defendant Parsons Steel, Inc. in the amount of Two Hundred Six Thousand Five Hundred Seventy Seven and 77/100 ($206,577.77) Dollars plus interest since December 31, 1978.

WHEREFORE THE PREMISES CONSIDERED, plaintiff demands judgment against the respective defendants as follows:

(a) A judgment against defendant Jimmy D. Parsons for the sum of Forty Two Thousand Two Hundred Twenty Eight and 68/100 ($42,228.68) Dollars pursuant to paragraphs 4, 6, 7, 8 and 9 of this complaint plus interest on said sum. Plaintiff further demands judgment against defendant Jimmy D. Parsons for an accounting of any and all monies he received for the sale of scrap metal belonging to Parsons Steel Industries, Inc. not itemized above, and for any sum paid by Parsons Steel Industries, Inc. for car insurance premiums for automobiles owned by Jimmy D. Parsons, and demands judgment against him for any such amount.

(b) A judgment against defendant Melba Parsons in the amount of Fifteen Thousand ($15,000.00) Dollars plus interest pursuant to paragraphs 4, 5 and 7 of this complaint. Plaintiff further demands judgment against defendant Melba Parsons for an accunting of any and all sums paid by Parsons Steel Industries, Inc. for car insurance premiums for automobiles owned by her, and demands a judgment against her for any such sum.

(c) A judgment against defendant Joe L. Cherry for the sum of Sixteen Thousand Three Hundred Fifty Four and 40/100 ($16,354.40) Dollars plus interest pursuant to paragraph 10 of this complaint.

(d) A judgment against defendant Parsons Steel, Inc., a corporation, for the sum of Two Hundred Six Thousand Five Hundred Seventy Seven and 77/100 ($206,577.77) Dollars plus interest pursuant to paragraph 11 of this complaint.

(e) Plaintiff prays for such other or further relief to which it is entitled.

Respectfully submitted,

A. Pope Gordon, Trustee

STATE OF ALABAMA
COUNTY OF MOBILE

Personally appeared before me the undersigned, an officer authorized to adminster oaths, Jim Parsons who states and deposes that he is President of Parsons Steel Industries, Inc., 110 Birmingham Highway, Montgomery, Alabama, who being duly sworn deposes and says on oath that Parsons Steel Industries, Inc., has furnished to P. A. Arnold Construction Company, Inc., certain materials, including a steel building, for use in the project known as Georgia Power Line Crew Headquarters, Winder, Georgis, under and by virtue of a contract between Parsons Steel Industries, Inc. and P. A. Arnold Construction Company, Inc.

Deponent, on behalf of Parsons Steel Industries, Inc., in consideration of the sum of eight thousand three hundred and thirty four Dollars, representing the entire contract price due to Parsons Steel Industries, Inc., receipt of which is hereby acknowledged, does hereby waive, release and quit claim in favor of Aderhold Construction Company and its successors or assigns, all rights that it may now or hereafter have to a lien upon the land and improvements above described; deponent further warrants that Parsons Steel Industries, Inc. has not and will not assign its claim for payment; that it has not and will not perfect a lien against said property; and he has the right to execute this waiver and release of lien.

Jim D. Parsons

Sworn to and subscribed before me
this 8th day of March, 1979.

Myrtle Wood
Notary Public,

Mobile County, Alabama

My commission expires 11-13-82

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 83-7395
[Caption Omitted]

MOTION TO SUPPLEMENT THE RECORD ON APPEAL

Pursuant to Rule 17(c) (8) and (10) of the Rules of this Court, Plaintiffs-Appellees move the Court to supplement the record on appeal by including therein the entire record from *Parsons Steel, Inc. et al. v. First Alabama Bank of Montgomery, N.A.*, Civil Action No. 79-249-N, in the United States District Court for the Middle District of Alabama, on the following grounds:

1. The instant appeal is from an injuction issued by the United States District Court for the Middle District of Alabama, pursuant to 28 U.S.C.A. § 2283, to protect and effectuate its earlier judgment of June 17, 1981 in *Parsons Steel, Inc. et al. v. First Alabama Bank of Montgomery, N.A.*, Civil Action No. 79-249-N, which was affirmed by this Court in *Parsons Steel, Inc., et al. v. First Alabama Bank of Montgomery, N.A.* (No. 81-7556), 679 F.2d 242, decided by this Court on June 25, 1982.

2. It was stipulated by the parties and agreed by the Court that the Court take judicial notice of the entire Court file in the prior case, as evidenced by the following excerpt from the record of the hearing on the complaint for injunction in this action.

MR. WILSON:

> "* * * I would first like to ask the Court if it would be appropriate for this Court to take judicial notice of the matters in the federal litigation which, of course, was tired before this Court?

THE COURT:

> "It is appropriate for the Court to take judicial konwledge of it. But I, like Mr. Nachman, I don't

completely trust my recollection. I want each of you to feel free to contribute to my recollection of what is in the record in the federal case. I know you have all reviewed it since I have, and I don't pretend to remember everything. * * *

MR. NACHMAN:

"I just wanted to say that I would stipulate, Your Honor, that any party can ask the Court to take judicial notice of any of the materials on file in the federal action, if that would help.

THE COURT:

"Thank you."

(R. 8-9)

Pursuant to that stipulation, the Court did take judicial notice of the record from *Parsons Steel, Inc., et al. v. First Alabama Bank of Montgomery, N.A.*, Civil Action No. 79-249-N, as evidenced by the opinion of the district court in this case entered June 15, 1983. The Court expressly referred to pleadings in the prior case (p.1, 5 and 6); the evidence in the prior federal case (p.4, 12, 13-15); the depositions in the prior case (p.7).

Respectfully submitted,

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: James A. Byram, Jr.

Attorneys for
Plaintiffs-Appellees

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 83-7395
[Caption Omitted]

ORDER

ORDER:

IT IS ORDERED that the motion of appellees to supplement the record on appeal is granted subject to a determination of relevance by the panel to whom this appeal is submitted for disposition on its merits.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

TRUSTEE'S CLAIMS

COMES NOW the Honorable A. Pope Gordon, Trustee in Bankruptcy, by and through counsel, in response to the Court's Order of February 6, 1985, and states its UCC claims and statutory bases therefor in the above-referenced case:

The Trustee alleges that the Defendant First Alabama Bank of Montgomery, N.A. (hereinafter referred to as "First Alabama") conducted a commercially unreasonable sale and wrongful disposition of the assets of Parsons Steel Industries, Inc. (hereinafter referred to as "PSII") after a foreclosure in January of 1979. Such conduct failed to comply with the requirements of §7-9-507 and 7-9-504, *Code of Alabama,* 1975. Under §7-9-507, Trustee is entitled to recoup any "loss" caused by First Alabama's failure to comply with §7-9-504(3). Additionally, §7-9-504 requires that any sale is subject to the articles

on sales; and §7-1-201, *Code of Alabama,* 1975, imposes an obligation of good faith in the performance or enforcement of any contract or duty for sales. Trustee contends that the commercially unreasonable sale of PSII's assets by First Alabama infringed on the unsecured creditors' legal rights to the equity over and above the price for which the property was sold, a price Trustee contends was grossly inadequate.

I. Section 7-9-507(2) provides that:

> . . . If the secured party either (1) sells the collateral in the usual manner in any recognized market therefor or (2) if he sells at the price current in such market at the time of his sale or (3) if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold, he has sold in a commercially reasonable manner. . . .

Trustee alleges that the sale in this case was not made in accordance with the three methods of sale as set forth in §7-9-507(2), to wit:

(1) Trustee alleges that there is no "recognized market" for the sale of an entire industrial plant.

(2) Trustee alleges that the price paid by Michael Orange to First Alabama was not a "price current in such market at the time of the sale" but was merely calculated by determining an amount equal to the amount of debt owed to First Alabama by PSII.

(3) Trustee alleges that the sale was not in conformity with "reasonable commercial practices among dealers in the type of property sold" for to have been so, would have required notice of such a sale to prospective buyers within the steel business in Central Alabama.

II. Section 7-9-504(3) provides that:

> . . .every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable.

Trustee alleges that the place, manner, method and terms of the private sale were not commercially reasonable and, therefore not in compliance with §7-9-504(3), *Code of Alabama,* 1975, to wit:

(1) Disposition of the collateral was made at a private sale two days after repossession by First Alabama.

(2) Only one prospective buyer was notified of the private sale by First Alabama.

(3) The buyer of the collateral had no prior experience in the steel industry and no prior knowledge of the value of the real estate, inventory, equipment, or facilities used by this particular business.

(4) No attempt was made by First Alabama, or any of its agents, to contact any person, firm, or corporation in the steel industry or any unsecured creditor of PSII as to the date and time of the private sale.

(5) No notice of the private sale was given to the attorney for PSII at that time by First Alabama or any of its agents, until one day after the private sale.

(6) No notification of the sale was placed in any industry or trade publication, or any newspaper, magazine or publication of any sort concerning the private sale.

(7) The only persons in attendance at the private sale were Michael Orange, his attorney, and Defendant Ed Herbert as agent for First Alabama.

(8) The place of the private sale was not at the plant site, or any other public place, but rather in the private office of Defendant Herbert located at First Alabama.

(9) Only one bid was received by First Alabama to purchase the assets of PSII and that bid came from Michael Orange.

(10) The price paid by Michael Orange for the collateral was not determined by estimates of fair market value or by a price which could be obtained from dealers in the kind of assets purchased, but rather by a determination of the amount of indebtedness owed to First Alabama by PSII at that time. The only factor considered by First Alabama in determining the sales price for the collateral was that figure.

(11) The actual value of the collateral was in excess of $2.5 million, and the $907,252.85 paid by Michael Orange was grossly inadequate thereby raising the presumption that the sale was held in bad faith.

James Jerry Wood

Attorney for Trustee

OF COUNSEL:
Wood, Minor & Parnell, P.A.
P.O. Box 4189
Montgomery, AL 36103
832-4202

EXHIBIT "B"

[R-1447] Q. Can you tell the Court and the Jury what reasons the First Alabama Bank had for conducting a private rather than a public sale on the Courthouse steps?

A. Had someone there who said they would take over the debt and try to pay the debt off.

Q. All right. Was the reason for you doing it that way because you had Michael Orange there and he was willing to do it?

A. It had already been offered to Ajax Atlas and Michael Orange and they wouldn't buy it and we had a willing person who would take it over.

Q. Was the reason because you had Michael Orange there?

A. Yes.

Q. Was that the only reason?

A. No, but it was a convenient way to do it.

Q. If Jerry Wood had arrived there that day with the money, would you have sold the property to him?

A. I you had had the cash I would have sold it to you in a minute.

Q. But I didn't have any way of knowing about it, did I?

A. No.

Q. These creditors that you'd been talking to through the month of December didn't have any way of knowing either, did they?

A. They knew when they had to respond.

Q. Yes, sir. But they didn't know you were going to sell it, did they?

A. I think it was pretty obvious that it was going to

EXHIBIT "C"

[R-1204] . . . of them we hadn't heard from at all. They hadn't said yes, they hadn't said no. But the first thing I knew about what actually had occurred was, I was in Court taking depositions, I believe, it was on the the eighteenth. I first thought it was another date but I checked my notes and now I know it was the eighteenth. I got word, someone told me Jim Parsons was in may office and wanted to see me. I came into my office. He was out front and he looked very bad. He looked like a man that hadn't shaved for three or four days and just bad generally. And he asked, he said he just wanted to talk for five minutes. I explained I was in Court and so he came back to my office. He said I have some shocking news for you. I think, first, he said do you represent Mike Orange and I said no, I've never represented him, I represent the company. He said he had some shocking news for me and he told me there had been a repossession that had occurred, I believe he said, on the fifteenth. This conversation would be like on a Thursday and he was referring to the repossession that would happen say three days before on Monday. He went on and he said that, he first wasn't going to tell me who bought it and then later said in the conversation that it had been purchased by a corporation that Mike Orange had control of. I was very angry because no one had talked to me about these things and, you know, I had written the creditors and I didn't want them to think that I had not told them what I knew. I kept saying . . .

EXHIBIT "D"

[R-1446] Q. Where was the sale of these repossessed properties?

A. In my office.

Q. Who was present?

A. I believe, Mr. Hardegree, Mr. Orange and myself.

Q. Just three of you?

A. I believe that's correct.

Q. Who decided that we would have a private sale rather than a public sale?

A. I discussed this in advance with Mr. Parsons.

Q. Did you discuss it with anyone else?

A. No.

Q. Did you discuss it with your lawyers?

A. I think I did.

Q. Luther Ingles?

A. I think so.

Q. All right. You put in this note to Parsons, that's in evidence, waiving his five day notice under the Code that you complied with certain provisions of the Uniform Commercial Code. Are you familiar with that?

A. Yes.

Q. Who told you that complied with the Code?

A. The attorney.

Q. Who?

A. Luther Ingles.

Q. Did he tell you that on the Fifteenth of January?

A. I don't think so. I think it was prior to the Fifteenth.

EXHIBIT "E"

[R-1448] go into foreclosure if they didn't accept.

Q. No, sir. Let me ask you this. Did you tell any of them that you were going to do it?

A. I think it implies that in the composition letter to the creditors.

Q. Did you tell Sam Kaufman, the attorney for Parsons Steel Industries, that you were going to do it or had done it?

A. No.

Q. Mr. Herbert, tell the Court and Jury whether or not any of these goods were perishable goods that required you to do something immediately?

A. Not to my knowledge.

Q. You didn't have any lettuce or produce or anything of that kind, did you?

A. No.

Q. It was all stable, hard goods?

A. To my knowledge. I don't know of anything perishable.

Q. When you did this private sale to Mike Orange because he was there, did you consider the nature and character of these goods?

A. I don't know that that came into it.

Q. When Henry Hardegree and Orange and you were there, did you pick up the telephone and call anybody and say you were going to conduct the sale at ten o'clock?

A. I had already given written notice to Mr. Parsons.

* * *

[R-1450] from the real estate, the plant, the inventory, the tooling, was a price that was current in the market place?

A. No.

Q. Did you make any effort to find out?

A. No.

Q. Did you talk to any steel brokers?

A. No.

Q. I believe you testified about this before the Record, did you talk to Ed Hodge?

A. No.

Q. You told this Court and Jury a while ago when you were talking to Mr. Nachman that you thought that was a good company under Ed Hodge's toolage?

A. Yes, I did. He was a good customer.

Q. Wouldn't it have been important for the bank to ask Ed Hodge what this was worth at the time you were selling it?

A. I didn't consider that he was part of it at the time. He had already sold out and was gone.

Q. You didn't talk to Aesco Steel?

A. No.

Q. Mimco?

A. No.

Q. Nobody here?

A. No.

Q. Those people are local people, aren't they, Aesco and Mimco?

EXHIBIT "F"

[R-1448] go into foreclosure if they didn't accept.

Q. No, sir. Let me ask you this. Did you tell any of them that you were going to do it?

A. I think it implies that in the composition letter to the creditors.

Q. Did you tell Sam Kaufman, the attorney for Parsons Steel Industries, that you were going to do it or had done it?

A. No.

Q. Mr. Herbert, tell the Court and Jury whether or not any of these goods were perishable goods that required you to do something immediately?

A. Not to my knowledge.

Q. You didn't have any lettuce or produce or anything of that kind, did you?

A. No.

Q. It was all stable, hard goods?

A. To my knowledge. I don't know of anything perishable.

Q. When you did this private sale to Mike Orange because he was there, did you consider the nature and character of these goods?

A. I don't know that that came into it.

Q. When Henry Hardegree and Orange and you were there, did you pick up the telephone and call anybody and say you were going to conduct the sale at ten o'clock?

A. I had already given written notice to Mr. Parsons.

* * *

[R-1450] from the real estate, the plant, the inventory, the tooling, was a price that was current in the market place?

A. No.

Q. Did you make any effort to find out?

A. No.

Q. Did you talk to any steel brokers?

A. No.

Q. I believe you testified about this before the Record, did you talk to Ed Hodge?

A. No.

Q. You told this Court and Jury a while ago when you were talking to Mr. Nachman that you thought that was a good company under Ed Hodge's toolage?

A. Yes, I did. He was a good customer.

Q. Wouldn't it have been important for the bank to ask Ed Hodge what this was worth at the time you were selling it?

A. I didn't consider that he was part of it at the time. He had already sold out and was gone.

Q. You didn't talk to Aesco Steel?

A. No.

Q. Mimco?

A. No.

Q. Nobody here?

A. No.

Q. Those people are local people, aren't they, Aesco and Mimco?

EXHIBIT "G"

[R-1447] Q. Can you tell the Court and the Jury what reasons the First Alabama Bank had for conducting a private rather than a public sale on the Courthouse steps?

A. Had someone there who said they would take over the debt and try to pay the debt off.

Q. All right. Was the reason for you doing it that way because you had Michael Orange there and he was willing to do it?

A. It had already been offered to Ajax Atlas and Michael Orange and they wouldn't buy it and we had a willing person who would take it over.

Q. Was the reason because you had Michael Orange there?

A. Yes.

Q. Was that the only reason?

A. No, but it was a convenient way to do it.

Q. If Jerry Wood had arrived there that day with the money, would you have sold the property to him?

A. I you had had the cash I would have sold it to you in a minute.

Q. But I didn't have any way of knowing about it, did I?

A. No.

Q. These creditors that you'd been talking to through the month of December didn't have any way of knowing either, did they?

A. They knew when they had to respond.

Q. Yes, sir. But they didn't know you were going to sell it, did they?

A. I think it was pretty obvious that it was going to

EXHIBIT "H"

[R-1205] Jim, why didn't you inform me, why didn't anyone inform me what was going on. He said, first said that it was Mike's responsiblity and then later in the conversation though Mike had resigned. Anyway, I was left up in the air. He left and I went back to Court and I finished with my Court case around

four, came back and I called Mike. This is the conversation you're referring to, correct?

Q. Correct.

A. And I asked Mike what had happened. He said there had been a foreclosure. I said when did it happen? He said on the fifteenth. I said well there wasn't any notice and he said well we received notice from the bank, I think, he mentioned maybe the tenth or the eleventh. We received notice from the bank last week and the plan was, had you gotten necessary acceptances the notice would have been torn up. And I said why didn't you tell me these things Mike, you were chief executive officer. And he said, well I resigned and it was Jim Parsons' job to tell you. I said, you know, nobody told me you resigned and everybody agreed that I didn't know that. Then I said who bought it? I asked him three times. I thought, you know, that his corporation had bought it but I didn't ask him that, I just said who bought it and he said that I would have to get that information from Ed Herbert, that Ed would have to tell me who purchased it or what. I mean, I said what disposition was made. At that point he didn't even tell . . .

EXHIBIT "I"

[R-1446] Q. Where was the sale of these repossessed properties?

A. In my office.

Q. Who was present?

A. I believe, Mr. Hardegree, Mr. Orange and myself.

Q. Just three of you?

A. I believe that's correct.

Q. Who decided that we would have a private sale rather than a public sale?

A. I discussed this in advance with Mr. Parsons.

Q. Did you discuss it with anyone else?

A. No.

Q. Did you discuss it with your lawyers?

A. I think I did.

Q. Luther Ingles?

A. I think so.

Q. All right. You put in this note to Parsons, that's in evidence, waiving his five day notice under the Code that you complied with certain provisions of the Uniform Commercial Code. Are you familiar with that?

A. Yes.

Q. Who told you that complied with the Code?

A. The attorney. .

Q. Who?

A. Luther Ingles.

Q. Did he tell you that on the Fifteenth of January?

A. I don't think so. I think it was prior to the Fifteenth.

EXHIBIT "J"

[R-1444] A. No, I didn't ask them.

Q. You don't know whether or not they had seen the property, do you?

A. They said they were familar with the property.

Q. Yes, sir. They both said that in the meeting?

A. Yes.

Q. Was there any discussion about an overhead crane, how much they would be worth?

A. No.

Q. It was just a discussion conversation?

A. That's correct.

Q. And you're telling the Court and Jury that that was your basis for discounting the land value?

A. No. I was trying to find out, before I put out any more money, another hundred and seventy-six thousand dollars, if I got back a first mortgage on all the property whether I would be in the ball park for the two hundred that was already owing and another hundred and seventy-six thousand dollars. I certainly didn't want to put out more money than it would be worth. Our best opinion was that it was worth some additional funds.

Q. All right, sir. Let me ask you these questions. What was the inventory worth of Parsons Steel Industries, Inc. on January 15th, 1979?

A. The only way you can tell what inventory is worth is to sell it.

[R-1445] Q. Did you know?

A. No.

Q. You didn't know? What was the real estate of Parsons Steel and Parsons Steel Industries worth on that day?

A. I don't know.

Q. You know that seven acres of this twenty-five acres belonged to the Montgomery company, don't you?

A. I don't recall what belonged to whom. I recall, it was something like twenty-five or twenty-six acres involved.

Q. What was the equipment of Parsons Steel Industries, Inc. worth on January the 15th, 1979?

A. I have no idea what it was worth.

Q. Were your answer be the same for the tooling?

A. Yes.

Q. Or any other asset?

A. I'm not an appraiser.

Q. And you got no appraisal?

A. I had the one appraisal there and I took his book value.

Q. Larson Edge's appraisal?

A. Yes. Looked at both of them.

Q. Prior to selling this at a private sale, you didn't make any effort to determine the market value of this property?

A. No.

Q. Real or personal?

A. No.

* * *

[R-1449] He knew about it.

Q. Did you call anybody?

A. No.

Q. When you were arranging this private sale, did you consider whether or not there was a market, a ready market for steel plants or used steel plants?

A. I figured if there had been Mr. Parsons would have sold it.

Q. I'm asking what you considered?

A. No.

Q. You didn't do that, did you?

A. No.

Q. There was nobody you could call that deals in these things all the time, was there, Mr. Herbert?

A. Not to my knowledge.

Q. So you considered the relevant trade practices. You didn't know of a ready market place for the plant and the real estate?

A. No.

Q. How did you calculate the price?

A. I added up what Mr. Parsons owed me. I added the interest and then added an extra hundred and seventy-six thousand dollars that he needed to pay Mr. Hodge off and that's what the figure came from.

Q. Did the fair market value of any of these goods enter into your calculations whatsoever?

A. No.

Q. Do you know whether or not the price you obtained

EXHIBIT "K"

[R-699] is a sale that you compare to the property that you are appraising. Yes, sir.

Q. Did you make such an appraisal and come up with an opinion as to the market value of both the land and buildings of Parsons complex, we'll call it, here in Montgomery County?

A. I did, yes, sir.

Q. And what was the amount of that appraisal?

A. One million three thousand dollars.

Q. Would that include land and buildings?

A. Land and buildings, yes, sir.

Q. How much per acre did you put on the land?

A. Eight thousand dollars per acre.

Q. And on the buildings, did you go through and make an evaluation of the type of buildings and go through the normal course of events in making an appraisal on a structure of that type?

A. Yes, sir, I did.

Q. And taking depreciation away also?

A. That's correct, yes, sir.

Q. Do you recall the depreciation figures that you used?

A. Well, I have it here in the report.

Q. All right. Would you tell us what percentage of depreciation, type of depreciation you took away from the building values?

A. Of course it varied from building to building, according to the condition and age, but the first

EXHIBIT "L"

[R-1449] He knew about it.

Q. Did you call anybody?

A. No.

Q. When you were arranging this private sale, did you consider whether or not there was a market, a ready market for steel plants or used steel plants?

A. I figured if there had been Mr. Parsons would have sold it.

Q. I'm asking what you considered?

A. No.

Q. You didn't do that, did you?

A. No.

Q. There was nobody you could call that deals in these things all the time, was there, Mr. Herbert?

A. Not to my knowledge.

Q. So you considered the relevant trade practices. You didn't know of a ready market place for the plant and the real estate?

A. No.

Q. How did you calculate the price?

A. I added up what Mr. Parsons owed me. I added the interest and then added an extra hundred and seventy-six thousand dollars that he needed to pay Mr. Hodge off and that's what the figure came from.

Q. Did the fair market value of any of these goods enter into your calculations whatsoever?

A. No.

Q. Do you know whether or not the price you obtained

[R-1450] from the real estate, the plant, the inventory, the tooling, was a price that was current in the market place?

A. No.

Q. Did you make any effort to find out?

A. No.

Q. Did you talk to any steel brokers?

A. No.

Q. I believe you testified about this before the Record, did you talk to Ed Hodge?

A. No.

Q. You told this Court and Jury a while ago when you were talking to Mr. Nachman that you thought that was a good company under Ed Hodge's toolage?

A. Yes, I did. He was a good customer.

Q. Wouldn't it have been important for the bank to ask Ed Hodge what this was worth at the time you were selling it?

A. I didn't consider that he was part of it at the time. He had already sold out and was gone.

Q. You didn't talk to Aesco Steel?

A. No.

Q. Mimco?

A. No.

Q. Nobody here?

A. No.

Q. Those people are local people, aren't they, Aesco and Mimco?

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

PLAINTIFFS' RESPONSE TO TRUSTEE'S CLAIM

This response is filed by Plaintiffs First Alabama Bank of Montgomery, N.A., and Edward Herbert (collectively referred to hereinafter as Bank) to the document entitled, "Trustee's Claims" filed February 21, 1985, pursuant to the Court's Order following the opinion of the Eleventh Circuit in this case. The Eleventh Circuit affirmed in its entirety this Court's injunction against further prosecution and enforcement of all of Trustee's state court claims which had resulted in a state court judgment. The Eleventh Circuit remanded, however, to permit this Court to determine whether the injunction "should be modified to allow the Trustee to pursue his UCC claim based only on the actual foreclosure sale." (747 F.2d at 1381) The Court of Appeals held that there should be *no modification* of this Court's prior injunction, as to the Trustee,[1] in the following circumstances:

> "If the UCC claim merely alleges that improprieties involving the Bank and Michael Orange prior to the sale resulted in the receipt of an unfairly low price for the company's assets, then the district court was correct in finding privity and barring the Trustee from asserting the UCC claim in state court. The Bank has already been required to defend its relationship with Michael Orange and OSI, Inc. and its role in the events leading up to the sale. These are the facts underlying the BHCA and fraud claims. The Trustee is in privity with the Parsons as to the adjudication of those facts and is bound by the federal adjudication of these matters." (747 F.2d at 1380)

---

[1] As this Court knows, there is to be no modification at all as to other defendants in any circumstance.
(747 F.2d at 1380)

In short, if the Trustee should seek modification of the injunction—which to date he has not sought—he will have to convince this Court that his earlier UCC claim in state court was not based "solely on allegations that improprieties involving the Bank and Orange prior to the sale resulted in an unfairly low price." (747 F.2d at 1373, n. 11)

This response will demonstrate that the Trustee's entire UCC claim in the state court—from his pleadings at the commencement of the case to his jury argument at the close[2]—was based upon such alleged improprieties involving Bank and Orange, and that there was no other basis. Accordingly, this Court's injunction should not be modified, even if the Trustee should seek modification.

The initial state court complaint of Parsons-Montgomery was filed before bankruptcy by the lawyers for all of the Parsons' interests. In May and June of 1982—after bankruptcy in early 1979, after extensive proceedings in the bankruptcy court, and after the Trustee was involuntarily brought into the state court action[3]—the Trustee, over protests of the Bank, was permitted to amend this complaint and to adopt the first 37 grounds of the original Parsons-Montgomery complaint.

The factual basis for the Trustee's UCC claim of commercial unreasonableness was alleged in those first 37 paragraphs and is summarized in Paragraph 37:

> "As a result of the scheme and plan set in operation by Defendants 'Herbert' and 'Orange' as described hereinabove, plaintiff 'Industries' lost an on-going business, including all of its assets and properties of every

---

[2] Certified copies of all proceedings or documents referred to herein are filed contemporaneously herewith, except the state court complaints which are already Exhibit to the Bank's complaint in this Court.

[3] The Eleventh Circuit observed that the Trustee "was involuntarily joined as a party plaintiff." (747 F.2d at 1378)

> kind and description, was effectively rendered insolvent and left with approximately $840,000 owed to unsecured creditors as of January 17, 1979."

The remainder of Count IX simply alleged in conclusory terms that the sale was conducted in a commercially unreasonable manner; that the time and terms of the sale were commercially unreasonable; that Parsons-Montgomery did not receive reasonable notification; and that Orange and OSI, as purchasers of the collateral, failed to act in good faith, resulting in the loss of the assets of Parsons-Montgomery. There are no factual allegations concernign improper conduct of the foreclosure sale. The focus of the complaint is that the alleged improprieties between the Bank and Orange resulted in the alleged insufficient sales price.

In his Statement of Contentions filed in state court on January 14, 1983 and on the eve of trial, Trustee again restricted his UCC allegations to alleged wrongdoing between Bank and Orange prior to the sale. For example:

> "10...[F]rom November 1978 to January 17, 1979, Herbert and Orange were working in concert to acquire the business owned and operated by 'Industries' in Montgomery County, Alabama for Defendant Orange. The methods by which Defendant Orange took possession and obtained title to the assets and properties of 'Industries' could never have happened as it did without the active participation and assistance of Defendant Herbert as an officer, agent and employee of Defendant First Alabama Bank.
>
> 11. That Defendant First Alabama Bank, acting by and through ... Defendant Herbert, and Defendant OSI, Inc., acting by and through ... Orange actively participated in the scheme described hereinabove to take over the operation of the business affairs of 'Industries' ... which amounted to collusion between said Defendants to do

great damage and economic harm to Plaintifff, 'Industries', and the unsecured creditors of 'Industries,' said scheme effectively putting 'Industries' out of business for all practical purposes."

The only specific reference to the UCC claim was the conclusory contention in Paragraph 19: "That the private sale and disposition of the assets of the corporation conducted on or about January 17, 1979 was done so in a commercially unreasonable fashion."

Trustee's counsel, in opening statement in the state case (R61-62), adopted "Mr. Beasley's statement of what we expect the evidence to show."

Finally, in his closing argument to the jury, counsel for Trustee argued:

> "...Let me talk to you just briefly about the commercial reasonableness.
>
> You remember I asked Mr. Herbert certain questions very carefully from down here at the end of the rail and I tried to get an answer to those things I asked him about value of inventory. I don't know. Didn't try to find out. Just figured out what the Bank was owed. Same answers on all the other assets of Parsons Steel...And then the first thing in January, January 5, you got them figuring out how to walk away with all the goodies and leave the unsecured creditors and Parsons-Montgomery out in the cold. You think about it.
>
> . . .
>
> [Parsons-Montgomery is] entitled to recover on the commercial reasonableness because there was nothing reasonable about any aspect of the sale. There was only one bidder there. One person, one buyer. *It was all prearranged. It was done in secret.* It was done in a hidden

fashion. It was done in a hidden fashion, because first of all you've got a corporation that was formed especially for it, and didn't even have Orange's name on it. You think they didn't start trying to do this on January 5? It worked out just like it happened. You come up on the 19th, and we've got nothing left. The bank says, we're secured. We got Mike Orange. We got good management. We're without the debt. Sure, the company can do a lot better. It has done pretty well. Mr. Orange says he's reduced the debt from one point three to nine hundred thousand. He is still operating. He sold about six hundred thousand dollars worth of equipment and a lot of inventory. They could have paid these creditors if they had done it right. If they had done it right. They didn't do it right. This was commercially unreasonable because they ignored the values of this property. They handled it quietly. They say Jim Parsons waived notice,[4] but you notice on those letters they even changed the time from 10 to 2. They didn't want anybody else there. *They were going to sell it to Michael Orange. They made that decision way bakc on the 10th or 11th.* They said, you heard me ask Mr. Herbert, if I come with the money, sure we would have sold it to you. How was I going to know about it? They didn't call Ed Hodge, and say Mr. Hodge, do you want to but it back? They didn't want to work it out. Every aspect of the sale was commercially unreasonable. There is not one piece of evidence that should suggest to you that it was a commercially reasonable sale." R1573-1576. (emphasis supplied)

---

[4] The Eleventh Circuit has recognized this Court's preclusion of inquiry into this alleged wrongdoing by this Court's finding in the first *Parsons* case, "that the Parsons waived the notice requirement," leaving open only the question of whether the actual sale was commercially unreasonable. This issue amounts simply to a claim that the price at the sale was insufficient." (747 F.2d at 1373).

Plainly, therefore, the Trustee's state court UCC claim of commercial unreasonableness was based solely on alleged improprieties involving the Bank and Orange prior to the sale. The Trustee asserts, moreover, that these improprieties resulted in an alleged unfairly low price. There were no allegations or attempted proof about mishandling of the *actual sale,* other than allegations that no one else was notified and no one else was there because the sale to Orange was prearranged and agreed upon. The Trustee simply cannot say now that, in state court, the "UCC claim [was] based on alleged improprieties connected with the conduct of the foreclosure sale itself (*separate and apart from any of the events leading up to the sale).*" (747 F.2d at 1380) (emphasis supplied) On the contrary, it is clear that the Trustee's claim "rests on the same allegations of pre-sale improprieties that formed the basis of the fraud and BHCA claims." (*Ibid.*) Accordingly, this Court's injunction should not be modified in any respect.

Respectfully submitted,

/s/ M. Roland Nachman, Jr.

/s/ James A. Byram, Jr.

Attorneys for Plaintiff First Alabama Bank of Montgomery, N.A., et al.

IN THE CIRCUIT COURT OF MONTGOMERY
COUNTY, ALABAMA
No. CV-79-179-G
[Caption Omitted]

STATEMENT OF CONTENTIONS OF PLAINTIFF, TRUSTEE IN BANKRUPTCY

COMES NOW A. Pope Gordon, Trustee in Bankruptcy for the Estate of Parsons Steel Industries, Inc., by and through his attorneys, and makes the following statement of contentions:

1. That Parsons Steel Industries, Inc. (hereinafter referred to as "Industries") was an ongoing and solvent corporation in calendar year 1978.

2. That Defendant First Alabama Bank was the primary secured creditor of "Industries" as well as being the principal lender and supplier of commercial credit to "Industries".

3. That Defendant Ed Herbert was an agent and employee of Defendant First Alabama Bank and acted as counselor and advisor to "Industries" during calendar year 1978 and during January, 1979.

4. That Defendant Herbert forced "Industries" to hire Defendant Mike Orange and forced the Corporation to relinquish management control of the Corporation to Defendant Orange.

5. That a proposed composition of creditors was prepared by Defendants Herbert and Orange working in concert, and said Defendants wrongfully reduced the amount of assets of "Industries" showing on the balance sheet sent to all unsecured creditors under said proposed composition from Two Million Three Hundred Eighty-four Thousand Nine Hundred Forty-five and 89/100 Dollars ($2,384,945.84) to One Million Thirty-four Thousand Dollars ($1,034,000.00).

6. That the letter and statement which proposed the common law composition of creditors was fraudulent and misleading and

wrongfully portrayed the financial position of Plaintiff, "Industries", to the unsecured creditors.

7. That Defendant Bank, through its agent, Defendant Herbert, on or about January 8, 1979, advised "Industries", through its agent, Jim Parsons, that the total indebtedness owing to the Bank would become due and payable on January 15, 1979.

8. That the Bank notified "Industries" that it would sell all collateral security to satisfy the aforesaid loan at Defendant Herbert's office on January 17, 1979, at 2:00 p.m.

9. That on or about January 17, 1979, a private sale of all of the assets of "Industries" was made by First Alabama to Defendant OSI, Inc. at 10:00 a.m. (four hours prior to notice time), which purported to convey all rights and title to the said property and assets for a sale price of Nine Hundred Seven Thousand Dollars ($907,000.00). A bill of sale was executed and delivered by Defendant First Alabama Bank to Defendant OSI, Inc. on January 17, 1979, at 10:10 a.m., purportedly conveying for the consideration of Nine Hundred Seven Thousand Two Hundred Fifty-two and 85/100 Dollars ($907,252.85) certain described personal property of Plaintiff "Industries".

10. That at all material times in 1978, and specifically from November, 1978, to January 17, 1979, Herbert and Orange were working in concert to acquire the business owned and operated by "Industries" in Mongtomery County, Alabama, for Defendant Orange. The methods by which Defendant Orange took possession and obtained title to the assets and properties of "Industries" could never have happened as it did without the active participation and assistance of Defendant Herbert as an officer, agent, and employee of Defendant First Alabama Bank.

11. That Defendant First Alabama Bank, acting by and through its officers, agents, or employees, including Defendant Herbert, and Defendant OSI, Inc., acting by and through its of-

ficers, agents, or employees, including Defendant Orange, actively participated in the scheme described hereinabove to take over the operation of the business affairs of "Industries", including its assets and property which amounted to collusion between said Defendants to do great damage and economic harm to Plaintiff, "Industries", and the unsecured creditors of "Industries", said scheme effectively putting "Industries" out of business for all practical purposes.

12. That Defendants First Alabama Bank, Edward Herbert, OSI, Inc., and Michael Orange intentionally, wilfully, and fraudulently deceived the unsecured creditors and stockholders of Parsons Steel Industries, Inc. and thus caused the loss of substantially all of the assets of "Industries" rendering the Corporation insolvent and forcing some of the unsecured creditors of "Industries" to put the Corporation in involuntary bankruptcy.

13. That Defendants Orange and OSI, Inc. wrongfully obtained property belonging to "Industries", thus depleting the assets of "Industries" and effectively rendering "Industries" insolvent.

14. That Defendants OSI, Inc., Mike Orange, Edward Herbert, and First Alabama Bank owed a fiduciary duty to the stockholders and unsecured creditors of "Industries" to ensure that the assets of "Industries" were not wasted. As a proximate cause of the failure to exercise their fiduciary duty to Plaintiffs, "Industries" suffered losses of substantially all of its assets rendering the Corporation insolvent.

15. That Defendants OSI, Inc. and Mike Orange wrongfully converted to their own use all of the assets of the Corporation.

16. That Defendants Mike Orange and OSI, Inc. wrongfully detained for their own use all of the assets of the Corporation.

17. That Defendants Mike Orange and OSI, Inc. have, subsequent to their purchase of "Industries", disposed of inventory

belonging to "Industries" for amounts far less than the market value.

18. That all of the Defendants fraudulently conspired to obtain all of the assets of "Industries" and did so in derogation of the unsecured creditors of "Industries".

19. That the private sale and disposition of the assets of the Corporation conducted on or about January 17, 1979, was done so in a commercially unreasonable fashion.

20. That Defendants Orange and OSI, Inc., by and through its predecessor in title, Standard Steel Building Systems, Inc., on or about January 12, 1979, executed and delivered to "Industries" a promissory note whereby said Defendants promised to pay "Industries" on order or demand the sum of Twenty-three Thousand Dollars ($23,000.00) with interest thereon at the rate of eight (8%) percent per annum and agreed to pay a reasonable attorney's fee for collection and waived exemption from execution.

21. That Defendants Orange and OSI, Inc. did wrongfully convert a life insurance policy on the life of Edward Hodge with a cash value of approximately Eight Thousand Dollars ($8,000.00) which was owned by "Industries". Plaintiff contends that Defendants Orange and OSI, Inc. have wrongfully converted to their own use said life insurance policy.

WHEREFORE, for the contentions described in Paragraphs 1-19 hereinabove, and for those contentions more fully described in Counts I-VIII of Plaintiff's Complaint as Amended, "Industries" claims compensatory and punitive damages from all Defendants separately and severally in the amount of Ten Million Dollars ($10,000,000.00). For the contentions described in Paragraph 20 hereinabove and Count X of Plaintiff's Complaint as Amended, Plaintiff "Industries" claims damages against Defendants Orange and OSI, Inc. in the amount of

Twenty-three Thousand Dollars ($23,000.00), interest, attorney's fees, and costs. For the contentions in Paragraph 21 described hereinabove, and for those contentions contained in Count XI of Plaintiff's Complaint as Amended, Plaintiff "Industries" claims damages against Defendants Orange and OSI, Inc. for the value of the life insurance policy referred in paragraph 21 above or in the alternative for return of said policy to Plaintiff "Industries".

Respectfully submitted,

/s/ James Jerry Wood

/s/ Thomas R. DeBray

Attorneys for Trustee

[R-61] OPENING STATEMENTS

By Mr. Wood:

Ladies and Gentlemen, as Jere Beasley told you, Tom Debray and I represent Pope Gordon and the unsecured creditors who were creditors of Parsons Steel Industries, Montgomery at the time of the foreclosure by the bank. Let me just in the interest of time tell you that I adopt Mr. Beasley's statement of what we expect the evidence to show. Essentially, I agree with everything he has stated that the evidence is going to be. We're in the case because when the bankruptcy of Parsons Steel Industries of Montgomery came about, there were creditors who were owed eight hundred thousand plus or minus dollars. They had no notice of any foreclosure sale. The evidence will show that the bank obtained from Michael Orange enough to satisfy **[R-62]** the bank's debt but not any more for those creditors who didn't have any collateral or any security. We are here on their behalf in a representative capacity. We ask you to pay careful attention to the evidence as it comes to you. Mr. Beasley is correct. We are asking for a substantial amount of money. We have men, as unsecured creditors and as stockholders, substantially damaged in this case. So, give us your careful attention and we'll ask you to render a true verdict when it is over. Thank you.

* * * * *

[R-101] OPENING STATEMENTS

By Mr. Wood:

May it please the Court, Ladies and Gentlemen, just briefly. I know you are ready to start hearing the testimony and we are ready to get to it. Mr. Nachman did mention to you as you read from a document in another proceeding that certain statements were made by the trustee, Mr. Gordon. We expect if the Court lets that evidence come in, that there will be evidence that that information did indeed come from witnesses that were tied to

the bank. Certain officers of the bank. Certain lawyers for the bank and certain accountants. So those sworn answers and inconsistent positions somewhere else, we expect our evidence to show you where that information came from and how those allegations came to be. Thank you.

* * * * *

[1572] CLOSING STATEMENT

By Mr. Wood:

Ladies and Gentlemen, as y'all know from the first day I told you in opening statements that I represented Mr. Pope Gordon, and I've done that throughout this trial. You've watched me in tandem with the other Plaintiffs' lawyers talk about the evidence, and we've been in agreement on that. I come to you now behind Jere Beasley who has stated the evidence to you as I have seen it. He stated what he expects the Judge to say to you.

Let me, before I say anything to you, say at this time that I appreciate the fact that you've been here seven days. I'm not going to be here very long. I'm going to tell it as simply and directly as I know how why we're here, why we're in this lawsuit, why from the evidence you've heard from this stand there ought to be a recovery by Parsons Steel Industries, Inc., Montgomery. That is, my client, Pope Gordon, the Trustee. You've already heard testimony that we're here because **[R-1573]** Pope was appointed. He represents the interest of those people that Mr. Nachman has talked about in the evidence when he said, you know, this steel company, Paoli Steel, U.S. Steel - there's a lot of folks. We represent Dr. Dick Brown. We represent the Workmen's Compensation folks. This Company was a self-insurer, Workmen's Comp. When you look at these documets, and you'll have them back there — like Plaintiffs' Exhibit 203. Look at all these people. Folks that haul steel in here. Teague Hardware. Alabama Baron. United Lighting. All

these folks. These are the folks who, when this company was foreclosed on, and when these things happened that you've heard about happened, were cut off. I won't go into a lengthy discussion with you on the law. We agree with those theories Jere Beasley told you, but certainly we believe we're entitled to recover on the commercial reasonableness. We're entitled to recover on the fraud and conspiracy. Let me talk to you just briefly about the commercial reasonableness.

You remember I asked Mr. Herbert certain questions very carefully from down here at the end of the rail and I tried to get an answer to those things. I asked him about value of inventory. I don't know. Didn't try to find out. Just figured out what the bank was owed. Same answers on all the other assets of Parsons Steel. Why is it important? It's important because if there was equity on those assets, if those assets were worth more than the bank was owed, then these folks I represent and this Montgomery company, they were entitled to **[R-1574]** be paid. I asked Mr. Herbert, how did you all do that? Wasn't the net effect, Mr. Herbert, of forming this new corporation to shut off these unsecured creditors? You see, they could have avoided the expense of a new corporation if they just wanted to sell a going business. You heard that testimony over and over; we just wanted to sell a going business because you can get more for it. The bank got more for it. They cut off about a million dollars worth of debts; eight hundred and forty-six thousand. You form a new company and you leave all that behind. You form a shell corporation knowing that you're going to get these good assets, and the creditors when they wake up, you heard Sam Caufman. I represented the company, he told me. Nobody told me. I asked Mike Orange, and he said you'll have to ask somebody else. I asked Ed Herbert, and he said you weren't my lawyer. The bottom line is, they sent out a letter, a composition letter, to the creditors and said we're going to do something good for you. The bank's gonna cut the interest to six percent. We're goint to work this thing out. That letter goes out on the

21st, during the Christmas holidays. Nothing really happens. And then the first thing in January, January 5th, you got them figuring out how to walk away with all the goodies and leave the unsecured creditors and Parsons-Montgomery out in the cold. You think about it.

You don't leave your common sense at home when you come down here. Our jury system is wonderful because **[R-1575]** folks like you can come and think about it, and you can sift out of all of this stuff the truth. The truth is, no matter how you look at this evidence that came to you from the stand, the bankrupt corporation Parsons Steel Montgomery is entitled to recover in this case. It's entitled to recover on the commercial reasonableness because there was nothing reasonable about any aspect of the sale. There was only one bidder there. One person, one buyer. It was all pre-arranged. It was done in secret. It was done in a hidden fashion. It was done in hidden fashion, because first of all you've got a corporation that was formed especially for it, and didn't even have Orange's name on it. You think they didn't start trying to do this on January the 5th? It worked out just like it happened. You come up on the 19th, and we've got nothing left. The bank says, we're secured. We got Mike Orange. We got good management. We're without the debt. Sure, the company can do a lot better. It has done pretty well. Mr. Orange says he's reduced the debt from one point three to nine hundred thousand. He is still operating. He sold about six hundred thousand dollars worth of equipment and a lot of inventory. They could have paid these creditors if they had done it right. If they had done it right. They didn't do it right. They didn't do it right because they didn't want to fool with having to go through with a chapter XI. You heard me ask Bill Richardson, who is a nice man and banker for First Montgomery. Would it have been more difficult **[R-1576]** for the bank if they had gone into a Chapter XI, and he laughed. Do you remember that? He said, sure it would have been more difficult. We didn't want that. We wanted to avoid that. They wanted to avoid it because it only cost the unsecured creditors

and this Montgomery corporation. This was commercially unreasonable because they ignored the values of this property. They handled it quietly. They say Jim Parsons waived notice, but you notice on those letters they even changed the time from ten to two. They didn't want anybody else there. They were going to sell it to Michael Orange. They made that decision way back on the 10th or 11th. They said, you heard me ask Mr. Herbert, if I come with the money, sure we would have sold it to you. How was I going to know about it? They didn't call Ed Hodge, and said, Mr. Hodge, do you want to buy it back? They didn't want to work it out. Every aspect of the sale was commercially unreasonable. There's not one piece of evidence that should suggest to you that it was a commercially reasonable sale. Mr. Herbert says, we did what we had a legal right to do. I suggest to you that they don't have a legal right to conduct this sale in a commercially unreasonable fashion and take what these creditors and this company was entitled to. They don't have alegal right to do that. The Judge is going to charge you on the law. They did something they didn't have a right to do. That's why we're here. That's why I asked you, when you look at the evidence, to return a verdict of commercially unreasonableness for the **[R-1577]** Trustee and for Parsons Steel Industries in Montgomery. I ask you to return a verdict with numbers like Mr. Beasley proposed. You've got some specific claims. The statement of affairs in here. You'll have all these documents. Look at Plaintiffs' Exhibit 203 and go through there. You'll see that we're owed some money, but that's not how you arrive at how much we are entitled to, based on the evidence you've heard. Look at those assets and you can get a value, whatever value you determine, from the evidence, they're entitled to, and you back out of that the nine hundred and seven thousand dollars the bank actually got. You've got a differential, and the Trustees are entitled to that.

I won't say a lot about fraud and conspiracy. I'll just tell you this. It would appear that somebody's not telling the truth. The Judge is going to charge you on the credibility of the witnesses.

You don't have to remember what you said to tell the truth. You've heard evidence from this stand; from time to time, folks didn't exactly tell the truth under oath, or at least they changed it. They shaded the truth, and they've had documents that say things that they really didn't, that they really couldn't truthfully say. You think about that. Do they have anything to hide? Why? They say the bank didn't get anything out of it. Sure the bank got something out of it. They avoided handling it right in bankruptcy, if that was where it would have wound up. It avoided all of these unsecured creditors and had a **[R-1578]** company with that much additional momentum going. It avoided all that. I don't know what Mr. Herbert got. I'm not suggesting he got anything. From this evidence, there was a reason for it. Two accountants — he has a major in accounting — and Mr. Orange looked at those balance sheets. Somehow, some way in December, they decided to do it differently. They said, we want good management. They had good management. They had Michael Orange. If you assume all of their statements are correct, he had the option agreement. Why didn't they just let him stay out there, run it, and sell off the inventory? They had that right. I suggest to you that there was a reason for taking this company over, from the evidence that you've heard.

I agree with Mr. Beasley that we need to send them a message. I don't say that with any attempt to be dramatic. The only way you can keep this kind of thing from happening to other people is hit these folks where it hurts. Tell them, don't do it any more. We ask you in this case to award punitive damages. We think that the facts justify it.

The Judge is going to tell you what the law is, and I think when you apply that law he gives you to these facts, the only verdict you can conscientously come back with is a verdict for the Trustees and the Plaintiffs in this case. Thank you.

THE COURT: Mr. Nachman?

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

ORDER

In accordance with the Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that the injunction heretofore issued by this Court in this cause should not be modified to allow the Trustee to pursue his UCC claim.

DONE this 29th day of March, 1985.

_____
United States District Judge

OPINION

The history of this case is well stated by the Court of Appeals in *Parsons Steel, Inc. v. First Alabama Bank of Montgomery*, 679 F.2d 242, [Parsons I], and in *First Alabama Bank v. Parsons Steel, Inc.*, 747 F.2d 1367 (11th Cir. 1984) [Parsons II]. The Court of Appeals in Parsons II remanded with instructions that this Court make fact-findings to determine whether the injunction should be modified to allow the Trustee to pursue his UCC claim based only on the actual foreclosure sale. That Court pointed out in guidance:

> "Assuming that the Trustee's UCC claim is based on factual allegations different from those underlying the fraud and BHCA claims, the parties' interests were not so closely aligned as to say the Parsons virtually represented the Trustee as to this narrow claim that the Parsons did not raise in the federal action."

In response to the remand for clarification of the commercial unreasonableness claim, this Court ordered the Trustee to specifically set out said claim. That claim will be considered and compared to the Parsons I claim hereinafter.

The Court of Appeals stated in Parsons II that, almost a year after this Court's judgment [referring to Parsons I] in the Bank's favor, "the Trustee amended his [State] complaint to include the UCC claim that the foreclosure sale was commercially unreasonable. Until that point in the litigation, the state action against the Bank was based on factual allegations which had been fully adjudicated in the BHCA action. With the addition of the UCC claim, however, the state action began to involve fact questions which the district court found were part of the federal complaint, but which were not reached in the federal litigation" [Parsons II, at 1379-1380]. The Court of Appeals held that the record on appeal was insufficient, however, to determine whether the UCC claim is based on the same factual allegations as was the fraud and the BHCA claims. As noted by the Court of Appeals [Parsons II, at p. 1379], the UCC claim in Parsons II is based on commercial unreasonableness. Paragraph 27 of the complaint in Parsons I federal case concerned commercial unreasonableness.[1] This Court found against the Plain-

[1] Said Paragraph 27 of the Parsons I complaint contained this allegation: "The sale *** was not handled in a commercially reasonable manner ***." The pleaded reasons therefor related to the same facts from which the BHCA violation and the fraud allegations allegedly arose as stated in the complaint. Loose pleading requirements allowed Plaintiffs to state in a one-count or one-claim complaint allegations of a BHCA violation [Paragraph 34], a conspiracy [Paragraphs 25 and 29], a trust violation [Paragraph 26], a commercially unreasonable sale [Paragraph 27], lack of good faith, CODE OF ALABAMA [1975], § 7-1-201, and fraud [Paragraph 30]. It is difficult for this Court to understand the conclusion in the dissent, Parsons II, at p. 1382, as follows: "[A]s the majority correctly notes, the commercial reasonableness claims — the factual basis for which is unclear on the present record — were not pleaded at all in the federal action." The Trustee's attorney had access to these pleadings and participated in discovery. He was clearly privy to the commercial reasonableness claims. If they were treated as damages, he had every opportunity to have prayed that they be treated as a separate cause of action.

tiff on all aspects. Responsibility is on appellant to have a record showing the error. Nonetheless, the Appellate Court, in its remand, states the following:

> "If the UCC claim merely alleges that improprieties involving the Bank and Michael Orange prior to the sale resulted in the receipt of an unfairly low price for the company's assets, then the district court was correct in finding privity and barring the Trustee from asserting the UCC claim in state court." Parsons II, supra, at 1380.

CURRENT UCC CLAIM. Whether or not the UCC claim alleges only that "improprieties involving the Bank and Michael Orange prior to the sale resulted in the receipt of an unfairly low price for the company's assets" can best be determined by examining the Trustee's Claims filed herein February 21, 1985, in response to this Court's Order entered February 6, 1985, directing that the Trustee state with particularity his UCC claims.

CURRENT CLAIMS OF TRUSTEE. Guided by the Order of the Court of Appeals that res judicata would bar no part of the Trustee's UCC claims "separate and apart from any of the events leading up to the sale" [Parsons II, supra, at p. 1380], the Trustee's attorney sought to direct his claims to some impropriety occurring after the sale, complaining of a "commercially unreasonable sale and wrongful disposition of the assets of Parsons Steel Industries, Inc. *** after a foreclosure in January of 1979," in violation of CODE OF ALABAMA [1975], §§ 7-9-504, 7-9-507 and 7-1-201. Sections 7-9-504 and 7-9'507 deal with a commercially unreasonable sale, and Section 7-1-201 deals with the duty of good faith.[2]

---

[2] It is noted that Paragraphs 27 and 30 of the complaint in Parsons I contained allegations of a commercially-unreasonable sale and a lack of good faith, respectively.

More specifically, the Trustee contends in his response to this Court's Order directing specificity the following: (1) that the sale was a private sale of the securities two days after repossession; (2) that only one potential buyer was notified of the sale; (3) that the buyer had no pre-sale experience in the steel business; (4) that no contact was made with any person in the steel business or with any unsecured creditor; (5) that no notice was given the attorney for Parsons Steel Industries, Inc.; (6) that no notice was placed in any steel interest or public publications; (7) that no one except seller and purchaser were in attendance at the sale; (8) that the sale was at a private place; (9) that only one bid was offered and accepted; (10) that the price paid at the sale was determined in accordance with the amount necessary to satisfy the Bank's secured debt; and, finally, (11) that the sale price was $907,252.85 while the value of the collateral was in excess of $2,500,000.00.

It appears to this Court and this Court finds that each of these items of the current contentions of the Trustee was part of the original claims made in this Court and litigated in the suit by Parsons Steel, Inc., and affirmed by the Court of Appeals in Parsons I, supra.

In Paragraph 14 of the complaint [Parsons I], Plaintiffs alleged that on November 30, 1978, a balance sheet of Parsons Steel Industries, Inc., showed assets of $2,384,945.89 and liabilities of $1,910,747.09. Plaintiffs alleged in Paragraph 16 of the complaint that conditions were substantially the same on January 17, 1979. Paragraph 24 of the complaint contained allegations that on January 17, 1979, a private sale of the assets of Parsons Steel Industries, Inc., was held at 10:00 a.m., rather than at the announced time of 2:00 p.m., to OSI, Inc., for $907,252.85. Paragraph 25 of the complaint contained allegations that the agent of the Bank and Mr. Orange for OSI, Inc., worked in concert so as to obtain properties of Parsons Steel Industries, Inc., for Orange. Paragraph 26 of the complaint contained allegations suggesting a violation of a resulting trust. Paragraph

27 of the complaint contained allegations that the sale was "not handled in a commercially-reasonable manner in that the acquisition and sale were completely transacted in less than two days with the price paid by OSI being substantially less than the market value of the assets purported to be sold;" that no additional possible purchasers were given any opportunity to inspect the properties and submit bids; that the sale was not handled in conformity with reasonable commercial practices; and that the assets sold for other than the fair market value thereof. Paragraph 29 of the complaint contained allegations that the Bank, Orange and others were guilty of "collusion *** to do great damage and economic harm to the Plaintiffs and which effectively put ***" Parsons Steel Industries, Inc., out of business. Paragraph 30 of the complaint contained allegations of lack of good faith and fraud with intent to deceive and injure the Plaintiffs and the creditors of Parsons Steel Industries, Inc. Paragraph 32 of the complaint contained allegations of the January 17, 1979, private sale to OSI, Inc., a newly formed corporation, resulting in Plaintiffs' loss of an on-going business together with its assets, leaving unsecured debtors owed $847,000.00. Paragraph 34 of the complaint contained allegations of a violation of the Bank Holding Company Act. Paragraph 37 of the complaint contained allegations that Parsons Steel Industries, Inc., had been placed in involuntary bankruptcy. The Trustee in Bankruptcy and his attorney participated in discovery proceedings in Parsons I and, obviously, had access to the complaint which contained the above allegations when he elected not to pursue any remedy on the Trustee's part or on behalf of the creditors.

Another indication that the State claims relate to alleged presale activity can best be determined by the way that the Trustee's attorney processed them in the State court proceeding. In his opening statement, Mr. Wood adopted Mr. Beasley's statement, saying specifically the unsecured creditors "*** had no notice of any foreclosure sale" and that "the Bank obtained

from Michael Orange enough to satisfy the Bank's debt but not any more ***." [R. 61-62]. In his closing argument, Mr. Wood stated, "We are entitled to recover on commercial reasonableness—on fraud and conspiracy." [R. 1573]. Mr. Wood, further referring to the pre-sale failure to obtain purchasers and to determine the value of inventory, said that the Bank "didn't try to find out. Just figured out what the Bank was owed. Same answers on all the other assets of Parsons Steel." [R. 1573]. Mr. Wood stated that "*** Parsons Steel Montgomery is entitled to recover *** on the commercial reasonableness *** of the sale ***. It was *all pre-arranged.* *** It was done in hidden fashion. *** You've got a corporation that was formed especially for it" (emphasis added). [R. 1575]. Mr. Wood spoke of the Bank's wanting to avoid a Chapter 11 proceeding because it would have been more difficult. He spoke of the fact that the time of the sale was changed from "ten to two" because they did not want anyone else there because they "*** were going to sell to Michael Orange," that "they made that decision way back on the tenth or eleventh". [R. 1576]. Referring to the same pre-sale activity, Mr. Wood stated: "Some how, some way in December, they decided to do it differently." [R. 1578].

Trustee's attorney at the State trial complained (1) of plans made before the sale, (2) of fraudulent plans before the sale, (3) of insufficient notice before the sale, (4) of changing before the sale of the time of the sale, (5) of plans to sell to Orange made before the sale, (6) of plans to sell for the amount owed the Bank before the sale, (7) of avoidance of a Chapter 11 proceeding before the sale, (8) of failure before the sale to determine what the inventory was worth, (9) of failure before the sale to determine what other assets were worth and, finally, (10) of the "pre-arranged" lack of "commercial reasonableness of the sale".

Every word of the Trustee's attorney's statements during the State Court trial was devoted to pre-sale activities of Michael

Orange and the Bank's agent Herbert. No suggestion was made that the Defendants in the State court case did anything wrong after the sale. The only substantial change in the Trustee's position is that the Trustee's attorney, guided now by the admonition of the Court of Appeals, alleged, as a preamble to allegations of pre-sale activities, that the Bank "conducted a commercially unreasonable sale and wrongful disposition of the assets of Parsons Steel Industries, Inc., ***" after a foreclosure in January, 1979.

The Court of Appeals stated that, because the questions of liability and damages were bifurcated, evidence of an insufficient price as bearing on commercial reasonableness was never presented to the jury in the federal court trial. The parties to that proceeding and the Trustee had access to the pleadings and participated in a number of the discovery proceedings. They understood that commercial reasonableness of the sale was an issue in the case, whether as damages for the Bank Holding Company Act violation or as an independent claim as now asserted, and the Trustee had every opportunity to litigate commercial reasonableness either as a part of the Bank Holding Company Act or as a part of an independent claim for commercial reasonableness at his option. If the alleged value of the assets as compared to the sales price were not litigated in the trial proceeding in this Court, it was because the parties did not present it to this Court as an issue independent of the Bank Holding Company Act violation. The Trustee knowingly declined to participate. His failure to do so, whether by design (so as to obtain two bites at the apple) or by inadvertance, bars his doing so now under the doctrine of res judicata.

The Trustee's contention that the sales price was unreasonable derives from Plaintiffs' claim in Parsons I that the whole thing was planned prior to the sale and that the Bank's agent and Michael Orange, the purchaser, knew and arranged prior to the sale that the sales price would be the amount of the debt to the Bank. Note 11 of the Opinion of the Court of Appeals in Parsons II, supra, at 1373-1374, reads as follows:

> "The record in this appeal does not indicate what precise facts the UCC claim is based on. That is, it is unclear whether the claim is based on allegations that something about the handling of the actual sale was commercially unreasonable and resulted in an insufficient price or whether the UCC claim is based solely on allegations that improprieties involving the Bank and Orange prior to the sale resulted in an unfairly low price."

This Court concludes that the Court of Appeals' Opinion means that, if nothing wrongful happened at the time of the actual sale and the improprieties complained of involved allegations of wrongs by the Bank and Orange prior to the sale resulting in an unfairly low price, then Parsons and all those associated with him, including the Trustee, are barred from further pursuit of this proceeding. Clearly, in the mind of the Court the things that the Trustee still argues were wrongful occurred prior to the sale. While the Trustee insists that the sale itself was unreasonable and the disposition of the proceeds was wrong, he alleges no non-conclusory facts which would indicate that any wrong that was done at or after the sale was improper. His claims of impropriety relate to plans made by Herbert and Orange: failure to give public notice of the sale, failure to seek buyers for the sale, failure to hold the sale at the time previously planned and failure to learn the value of the property securing the debt — in short, failure to do those things prior to the sale which allegedly would have produced a fair price for the property sold. All of those matters have been litigated, and the Court of Appeals has affirmed a judgment for the defendant thereon. The Trustee, being in privy with the plaintiffs in that case, is bound by the proceeding.

This Court has been troubled by factors raised in the dissent in Parsons II beginning at 747 F.2d 1367. The dissenter takes the position that, while the original federal adjudication of this proceeding might have initially provided a res judicata bar to the State court proceeding, the determination by the State court

that the federal court proceeding was not res judicata of the issues in the State court constituted a res judicata bar to the federal court's considering the matter. The Bank, realizing that the pleadings were not specific and initially having its own doubts that all of the issues in the State court proceeding were barred by the doctrine of res judicata, found it necessary to proceed in the State court proceeding in order to determine that the issues in the State court proceeding were the same as that already concluded by this Court's judgment. That being true, the doctrine of res judicata could only be applied at such time as the issues in the State court proceeding were clearly identified and could be compared to the issues in Parsons I.

The dissenter argues that the Bank should have sought an injunction before the trial in the State court. In cases such as this where issues are not clear in either court, a special hearing would be required to determine precisely what the issues were in each proceeding. On occasion (and probably in this case) this could not have been fully determined until the trial on the issues. If this Court is to protect its jurisdiction, it must have the authority to do so at the point where invasion of jurisdiction becomes apparent. Piecemeal decisions thereon would be of little value.

This Court is of the opinion that the res judicata issue cannot be determined in some cases until the trial on the merits and that the Defendants in this case, by submitting to a trial on the merits including the plea of res judicata in the State case, cannot be held to a waiver of their rights to submit the res judicata issue to the court first having jurisdiction because the issue of waiver concerns itself with private rights as distinguished from public rights and the doctrine of res judicata has as its purpose the avoidance to the public, as well as the parties, of expenses of unnecessary litigation and the conservancy of judicial efforts. This Court is convinced that no private individual should be allowed in effect to waive the effect thereof.

This Court, therefore, finds that the injunction heretofore issued by this Court should not be modified to allow the Trustee to pursue his UCC claim because that claim is based on matters heretofore litigated by this Court, and the Trustee was privy to such litigation.

An Order will be entered in accordance with this Opinion.

DONE this 29th day of March, 1985.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

ORDER

This cause is now before the Court on Defendant Trustee's motion for reconsideration filed herein April 2, 1985, and on Plaintiffs' objection thereto filed herein April 3, 1985.

Upon consideration of said motion, this Court is of the opinion that the motion is a reargument of what has already been argued and ruled on. In *First Alabama Bank v. Parsons Steel, Inc.*, 747 F.2d 1367 (11th Cir. 1984), the Court states the circumstances under which the Trustee should be allowed to pursue his claim in State Court:

> "If the UCC claim merely alleges that improprieties involving the Bank and Michael Orange prior to the sale resulted in the receipt of an unfairly low price for the company's assets, then the district court was correct in finding privity and barring the Trustee from asserting the UCC claim in state court. ***.
>
> "If, however, the UCC claim is based on alleged improprieties connected with the conductg of the foreclosure sale itself (separate and apart from any of the events leading up to the sale), under the facts of this case equity dictates that the Trustee be allowed to pursue this narrow claim in state court. ***." Id., at 977.

The Court went on to say:

> "If the UCC claim is found to be based *solely* on the actual handling of the foreclosure sale (method, time, place, manner, etc.), the injunction should be modified to allow the Trustee to pursue this claim. ***." Id., at 978 [emphasis added].

To comply with the guidelines of the Court of Appeals, the Trustee attempted to rephrase his claims so as to allege a defect in the sale rather than an agreement to promote a defective (commercially unreasonable) sale. Yet, each claim refers to an alleged plan, act or omission occurring before the sale:

1. There was only one prospective buyer notified of the private sale by the Bank.

2. No notice of a private sale was given to the attorney for Parsons Steel until one day after the sale occurred.

3. The only persons in attendance at the private sale were Michael Orange, his attorney and Ed Herbert, in his capacity as agent for the Bank.

4. No notification of the sale was placed in any industry or trade publication or any newspaper, magazine or publication of any sort.

5. No attempt was made by the Bank to contact any person or company in the industry or any unsecured creditor of Parsons Steel as to the date and time of the sale.

6. Only one bid was received by the Bank to purchase the assets of Parsons Steel.

7. Disposition of the Parsons Steel collateral was made at a private sale only two days after repossession by the Bank.

8. The location of the sale was at the private office of Edward Herbert instead of at a public place.

9. The only factor considered by the Bank in determining the sales price for the collateral and, in fact, the price that was paid, was the amount of indebtedness owed to the Bank by Parsons Steel at the time the sale was made.

10. While the actual value of the collateral was in excess of 2.5 million dollars, the Bank received only a little over $900,000.00 for the collateral.

All of these matters could have been litigated in the original proceeding in this Court and most of them were. The apparent reason why little was said about these matters in the first trial is that Parsons, a veteran of the steel business, had exhausted possibilities of liquidation of his business before he agreed to the method finally negotiated by the Bank with Orange. Parsons knew and the Trustee must have known that a commercially unreasonable sale could not have then been proved.

Accordingly, it is ORDERED by this Court that Defendant Trustee's motion for reconsideration filed herein April 2, 1985, is hereby denied.

DONE this 21st day of May, 1985.

_____

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Defendant Tom McGregor*, as Trustee for Parsons Steel Industries, Inc., a Bankrupt, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Order of the District Court denying Defendant's pursuit of his UCC claim (commercially unreasonable sale) in State Court, said Order dated May 21, 1985.

DONE this 28th day of May, 1985.

/s/ James Jerry Wood
Attorney for Defendant Tom
McGregor, Trustee for Parsons Steel
Industries, Inc., a Bankrupt

PORTIONS OF BANK HOLDING COMPANY ACT CASE

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 79-249-N

PARSONS STEEL, INC., ET AL.,
Plaintiffs,

VS.

FIRST ALABAMA BANK OF MONTGOMERY, N.A.,
Defendant.

ORDER

In accordance with the Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that Defendant's motion for summary judgment filed herein January 29, 1980, be, and the same is hereby, denied.

DONE this 30th day of May, 1980.

United States District Judge

OPINION

This cause is now before the Court on the Defendant's motion for summary judgment filed herein January 29, 1980. The motion is submitted on the pleadings, exhibits, affidavits, depositions and other materials on file with the Court, along with the briefs supplied the Court by counsel for the Plaintiffs and the Defendant. Oral argument on the motion was heard March 4, 1980.

Plaintiffs brought this cause against the Defendant, alleging a violation of a portion of the Bank Holding Company Act Amendments of 1970, 12 U.S.C. §§ 1972(1)(C), 1975, (hereinafter referred to as the BHCA). Section 1972(1)(C) provides, *inter alia:*

> "A *bank shall not in an manner* extend credit, lease or sell property of any kind, or furnish any service, or *fix* or vary *the consideration for any of the foregoing, on the condition* or requirement—*that the customer shall provide some* additional credit, property, or *service to such bank, other than those related to* and *usually provided in connection with a loan,* discount, deposit, or trust service;" (emphasis added).

Although many of the surrounding facts are vigorously contested by the Defendant, this Court must view the evidence submitted most favorably for the Plaintiffs on Defendant's motion for summary judgment. When so viewed, the evidence reveals that Plaintiffs, Jim D. Parsons and Melba Parsons, are the sole stockholders of Plaintiff, Parsons Steel, Inc., of Mobile, Alabama. In January, 1976, Parsons Steel purchased 140 shares of stock in a Montgomery, Alabama, corporation then named Standard Machine Corporation. Shortly thereafter, Jim Parsons was elected President of the Montgomery corporation. On June 30, 1976, the remaining stockholders of Standard Machine Corporation sold their interest in the corporation to Parsons Steel. Soon thereafter, the name of the Montgomery corporation was changed to Parsons Steel Industries, Inc. For the sake of clarification, this Court will refer to Parsons Steel, Inc., of Mobile as the "parent" and to Parsons Steel Industries, Inc., of Montgomery as the "subsidiary".

The subsidiary had been banking with the Defendant—then named The First National Bank of Montgomery—since 1957. The subsidiary, under the direction of Jim Parsons, continued to do business with the Defendant. During the course of these business dealings, the subsidiary borrowed large amounts of

money from the Defendant on several occasions in order to finance its steel fabricating and manufacturing business. In connection with loans made to the subsidiary, both Parsons executed absolute guaranty agreements. On many occasions, loans were made without the filling out of a formal application therefor.

The loan officer of the Defendant in charge of the subsidiary's account left the employ of the Defendant in November, 1978. Prior to his departure, Jim Parsons had requested that the Defendant make additional funds available to the subsidiary and had submitted financial statements in connection with that request. When the replacement loan officer assumed responsibility for the account, the outstanding loans to the subsidiary totalled over $1,000,000.00.

Jim Parsons began negotiating with the Defendant on "restructuring" the subsidiary's debt in order to make additional money available to the subsidiary so it could pay off a portion of its outstanding accounts payable. Discussions of the amount contemplated to be loaned ranged from $600,000.00 to $250,000.00, but no loan application had been filled out. On November 30, 1978, inventory was taken of the subsidiary's assets in order to determine the security available for new loans. The inventory revealed assets totalling over $3,000,000.00.

On December 12, 1978, a meeting was held between the new loan officer, Jim Parsons and June Neely, the subsidiary's bookkeeper. Parsons and Neely contend that, at that meeting, the loan officer told them that the Defendant would make no further loans to the subsidiary unless the management of the subsidiary and 55 percent of the stock of the subsidiary were transferred to Michael Orange, a customer of the Defendant. On December 14, 1978, Jim Parsons executed an agreement granting Orange full power and authority to manage the subsidiary and the option to purchase 55 percent of the stock of the subsidiary.

Subsequent to the execution of that agreement, the Defendant refused to make additional loans to the subsidiary. On January 17, 1979, Defendant foreclosed on the assets of the subsidiary. After the foreclosure sale, the Defendant transferred the assets of the subsidiary to a corporation formed by Orange and loaned the corporation the purchase money. Subsequently, the subsidiary was forced into involuntary bankruptcy, and Plaintiffs instituted this cause alleging jurisdiction and stating a cause of action under 12 U.S.C. § 1975.[1]

---

[1] "§ 1975. Civil actions by persons injured; jurisdiction and venue; amount of recovery: Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including a reasonable attorney's fee."

Defendant contends that the motion for summary judgment should be granted (1) because the Plaintiffs were not "customers" of the Defendant and, therefore, lack standing to sue; (2) because there was no "extension of credit" required for the operation of § 1972(1)(C); and (3) because the Defendant's insistence on a change of management to a third party was not a "tying" arrangement prohibited by § 1972(1)(C).

With regard to Defendant's first contention, this Court has been directed to the United States Court of Appeals for the Fifth Circuit's decision in *Swerdloff v. Miami National Bank,* 584 F.2d 54 (5th Cir. 1978), the only reported decision to date construing the meaning of the word "customer" as used in § 1972 of the BHCA. In *Swerdloff,* the plaintiffs were the two 100 percent stockholders of a corporation which had assigned its accounts receivable to the defendant bank as collateral for loans. The plaintiffs had also personally guaranteed the loans. Plaintiffs alleged that the defendant bank advised them at one

point that the bank would no longer honor the accounts receivable financing agreement unless the plaintiffs transferred 51 percent of their stock in the corporation to one of the bank's other customers. The district court granted the defendant bank's judgment on the pleadings on the theory that only the corporation was a "customer" of the defendant bank and that the plaintiffs, as sole stockholders in the corporation, lacked standing to assert claims under § 1972 because the individual plaintiffs maintained no account with the bank and were not parties to the financing agreement between the corporation and the bank. *Swerdloff v. Miami National Bank,* 408 F.Supp. 940 (S.D. Fla. 1976). The Fifth Circuit Court of Appeals reversed the district court, stating, *inter alia:*

> "The economic realities of ownership and control must be considered in determining who is a 'customer' within the meaning of this section if the purpose of the Act is to be accomplished. A great deal of important business is done through closely held corporations. To decide in favor of the bank here would mean that banks throughout the country could require all manner of anticompetitive practices of the stockholders of such corporations with impunity. The law cannot be unmindful of the fact that substantial credit to such corporations is generally extended because of the credit ratings of the stockholder guarantors, regardless of the credit-worthiness of the corporation itself.
>
> "In the absence of a statutory definition, it is reasonable to draw upon the ordinary meaning of a word. In common usage, a customer is one who has business dealings with another or who purchases a commodity or service. While the [plaintiffs] did not maintain an account with [the defendant bank], they did enter into a contract of guarantee on which they were liable. Such a transaction certainly constitutes a business dealing with a bank." 584 F.2d at 58.

Defendant would distinguish *Swerdloff* from the case *sub judice* on the ground that, in this cause, the Parsons are the 100 percent stockholders of the parent corporation which is the owner of the subsidiary which had an account with the Defendant, i.e., this cause presents a situation one step removed from the circumstances presented in Swerdloff. This Court finds such an argument unpersuasive for several reasons. First, unlike the plaintiffs in *Swerdloff,* it appears that Jim Parsons did maintain a personal loan account with the Defendant. Second, like the plaintiffs in *Swerdloff,* both the Parsons personally executed a guaranty of the subsidiary's indebtedness which the Fifth Circuit Court of Appeals has indicated constitutes "a business dealing with a bank". Finally, the dicta quoted above, which expresses the Fifth Circuit Court of Appeals' concern for immunizing banks from liability when dealing with the stockholders of corporations having accounts with the bank, leads this Court to believe that the differences noted between the circumstances of this cause and those of *Swerdloff* is not a valid distinction.

Defendant's second contention is basically that there was never any specific sum for a loan agreed upon, that no loan application was ever filled out on behalf of the subsidiary, that no loan was ever made, and that, therefore, there was no "extension of credit" or other service by the Defendant to the subsidiary. As support for this contention, Defendant relies on the case of *Clark v. United Bank of Denver National Association,* 480 F.2d 235 (10th Cir. 1973), in which the Court stated:

> "Also important in connection with this argument is the fact the complained about tying arrangement never became a part of a final agreement. It was only discussed and considered as a part of the negotiating process. In fact, in the extensive depositions the evidence is entirely lacking to show event that loan negotiation ever reaches the point of a formal written application for a loan by appellants. Nor is there any evidence of an oral agreement between the parties concerning even any phase of a loan

> agreement. In fact, there were only conversations had between appellants and officers of Holding Company concerning the possibility of a loan." *Id.*, at 238.

However, the "argument" referred to in the above passage was that the requirement, that the borrower place money on interest-free deposit with the lender as a condition on the making of a loan, was a tying arrangement and a per se violation of the Sherman Antitrust Act. The reference to the BHCA was completely dicta due to the fact that the plaintiffs in *Clark* had only alleged breach of fiduciary duty, fraud, unfair competition, breach of warranty and violations of the Securities Exchange Act of 1934 and of the Sherman and Clayton Antitrust Acts. *Id.*, at 237.

In this cause, this Court is not being asked to hold that the actions of the Defendant constituted a per se violation of the Sherman Act or even a per se violation of the BHCA. The question before this Court is whether there exists a material issue of fact as to whether the Defendant fixed the consideration for the extension of credit on the condition that the customer provide some additional property or service to the bank other than those usually provided in connection with a loan. See, 12 U.S.C. § 1972(1)(C). The Plaintiffs have submitted affidavits to the effect that an officer of the Defendant stated that the Defendant would make no further loans to the subsidiary unless the Parsons transferred control and majority ownership of the subsidiary to a customer of the Defendant. Further affidavits have been submitted to the effect that, if the allegations are true, the "condition" placed on the making of further loans was not a condition "usually provided in connection with a loan". It is further undisputed that, during the course of the subsidiary's business dealings with the bank, few, if any, formal loan applications were ever filled out. In light of that evidence, this Court cannot hold, as a matter of law, that the Defendant did not fix the consideration for an extension of credit on an allegedly prohibited banking practice. The statute seems to outlaw such fixing of consideration for a loan even if the loan is not made.

Defendant's third contention is that, even if the Defendant conditioned the extension of credit on the transfer of ownership and control to a customer of the bank, such a condition does not constitute a tying arrangement prohibited by the BHCA. In *Swerdloff,* the Fifth Circuit Court of Appeals recognized that the BHCA "is directed at tying arrangements involving banks". 584 F.2d at 58. The Court went on to state:

> "The [BHCA] arose out of the concern 'that there be adequate safeguards against the possibility of misuse of the economic power of a bank.' [1970] U.S. Code Cong. & Admin. News, p. 5535. The provisions were directed at those abuses that would 'lead to a lessening of competition or unfair competitive practices.' They were intended 'to affirm in statutory language the principles of fair competition.' While the provision was expressly designed not to interfere with 'the conduct of appropriate traditional banking practices,'
>
> "[t]he purpose of this provision is to prohibit anti-competitive practices which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire. *Id.*" *Id.*

The only evidence this Court can find in the language of § 1972(1)(C) that the provision is limited to prohibiting tying arrangements is the requirement that the bank force the customer to furnish "to the bank" property or service not related or usually provided in connection with a loan. Defendant has attempted to point out that, in most reported decisions concerning the BHCA, the alleged prohibited condition involved the customer's being required by the bank to either place an interest-free deposit with the bank, see *Clark,* supra, or to sell a substantial share of the customer's accounts receivable to the bank, see *Costner v. Blount National Bank,* 578 F.2d 1192 (6th Cir. 1978). Defendant contends in brief that the insistence on a change of management "would in no way have forced Sub-

sidiary to accept some additional product or service of Bank. Rather it was an attempt by Bank to protect an existing loan by improving management in a debtor company." Defendant's Brief at 7.

A somewhat similar argument was advanced in *Swerdloff*. In that case, the defendant bank allegedly required the transfer of 51 percent of the stock of the customer plaintiff to another customer of the bank as a condition for continuing financing of the customer. The defendant bank contended that the plaintiffs made no allegation that the plaintiffs had been required to furnish *the bank* with a service not usually provided in connection with a loan. The Fifth Circuit Court of Appeals rejected such an argument, stating:

> "In a statutory provision intended to prevent the misuse of the economic power of a bank, however, such a specific allegation at the pleading stage of the case is unnecessary. *It is sufficient to allege that the bank required a customer to do an act not related to nor usually provided in connection with a loan. That there is a benefit to the bank will be implied for pleading purposes.*
>
> "Support for this interpretation is found in the report of the Senate Banking and Currency Committee. The report speaks of a prohibition of the requirement of the provision of an unusual service by the customer to 'the bank, the bank holding company or its subsidiary or to a business operated by one or more of the persons controlling the bank * * *.' [1970] U.S. Code Cong. & Admin. News, p. 5535. *This language indicates a concern with substance rather than form. Where there is a requirement of unusual service, at least an indirect benefit to the bank will be inferred upon a motion for summary judgment.*
>
> "Thus, the complaint adequately alleged a tying arrangement whereby a 'customer' of Miami National was required to provide an illegal service 'to such bank' in violation of 12 U.S.C.A. § 1972." [emphasis added]

This Court is aware that the district court in *Swerdloff* had granted the defendant's motion for judgment on the pleadings and was not ruling on a motion for summary judgment as is the case here. However, the above-quoted language indicates that the Fifth Circuit Court of Appeals has interpreted § 1972 to mean that a violation could be established if the unusual condition results in actual benefit to the bank even though the unusual service or transfer of property required of the customer flows to a third party. The quoted language clearly shows that, on motion for summary judgment by the bank, the inference of benefit must be indulged against the moving party. Therefore, under the facts of this cause, where it is undisputed that Mr. Orange was a customer of the Defendant at the time it is alleged that the Defendant required the subsidiary to transfer control and ownership to him, this Court cannot say, as a matter of law, that the Defendant derived no substantial benefit from the alleged unusual loan requirement.

Based on the foregoing, this Court finds that there exist material issues of fact left to be resolved and that, therefore, summary judgment would be inappropriate.[2]

An Order will be entered in accordance with this Opinion.

DONE this 30th day of May, 1980.

United States District Judege

[2] The statements of fact contained in this Opinion are based almost entirely on the evidence submitted by the Plaintiffs in opposition to the motion for summary judgment and are vigorously contested by the Defendant. This Court herein expresses no opinion on the probative value or weight to be given any of the evidence submitted by either party at this stage of this proceeding.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF JIMMY DOUGLAS PARSONS
Volume I

DEPOSITION OF JIMMY DOUGLAS PARSONS, taken pursuant to notice and stipulation on behalf of the Defendants, Michael Orange and OSI, Inc., in the Conference Room of Rushton, Stakely, Johnston and Garrett, 12th Floor, Bell Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, February 18, 1980, commencing at 1:30 P.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE:

JAMES JERRY WOOD, Esquire
Wood, Minor and Parnell
555 South Perry Street
Suite 100, Corporate Square
Montgomery, Alabama

FOR THE DEFENDANT — First Alabama Bank:

M. R. NACHMAN, JR., Esquire
and
ERIC BRUGGINCK, Esquire
Steiner, Crum and Baker
8th Floor, First Alabama Bank Building
Montgomery, Alabama

FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF JIMMY DOUGLAS PARSONS
Volume III

CONTINUATION OF THE DEPOSITION OF JIMMY DOUGLAS PARSONS, taken pursuant to notice and stipulation on behalf of the Defendants, Michael Orange and OSI, Inc., in the Conference Room of Rushton, Stakely, Johnston and Garrett, 12th Floor, Bell Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Friday, March 7, 1980, commencing at 9:05 A.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE: (Not Present)

JAMES JERRY WOOD, Esquire
Wood, Minor and Parnell
555 South Perry Street
Suite 100, Corporate Square
Montgomery, Alabama

FOR THE DEFENDANT — First Alabama Bank:

M. R. NACHMAN, JR., Esquire
and
ERIC BRUGGINCK, Esquire
Steiner, Crum and Baker
8th Floor, First Alabama Bank Building
Montgomery, Alabama

FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

DEPOSITION OF JIMMY DOUGLAS PARSONS, taken pursuant to notice and stipulation on behalf of the Defendant, in the Conference Room of Steiner, Crum & Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Tuesday, October 9, 1979, commencing at 10:15 A.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE DEFENDANT:

M. R. NACHMAN, JR., Esquire
ERIC BRUGGINCK, Esquire
Steiner, Crum and Baker
8th Floor, First Alabama Bank Building
Montgomery, Alabama

FOR MICHAEL ORANGE AND
OSI, INCORPORATED:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

FOR THE TRUSTEE:

JAMES JERRY WOOD, Esquire
Wood, Minor and Parnell
555 South Perry Street
Suite 100, Corporate Square
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF MELBA PARSONS

DEPOSITION OF MELBA PARSONS, taken pursuant to notice and stipulation on behalf of the Defendants, Michael Orange and OSI, Inc., in the Conference Room of Rushton, Stakely, Johnston and Garrett, 12th Floor, Bell Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, February 18, 1980, commencing at 10:10 A.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE:

JAMES JERRY WOOD, Esquire
Wood, Minor and Parnell
555 South Perry Street
Suite 100, Corporate Square
Montgomery, Alabama

FOR THE DEFENDANT — First Alabama Bank:

M. R. NACHMAN, JR., Esquire
and
ERIC BRUGGINCK, Esquire
Steiner, Crum and Baker
8th Floor, First Alabama Bank Building
Montgomery, Alabama

FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF MICHAEL ORANGE

DEPOSITION OF MICHAEL ORANGE, taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Tuesday, January 22, 1980, commencing at 10:15 A.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
Attorney at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE:

JAMES JERRY WOOD, Esquire
Wood, Minor and Parnell
555 South Perry Street
Suite 100, Corporate Square
Montgomery, Alabama

FOR THE DEFENDANT — First Alabama Bank:

M. R. NACHMAN, JR., Esquire
Steiner, Crum and Baker
8th Floor, First Alabama Bank Building
Montgomery, Alabama

FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

DEPOSITION OF E. W. HODGE, taken pursuant to notice and stipulation on behalf of the Defendant in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Tuesday, October 9, 1979, commencing at 9:08 A.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
Attorney at Law
300 South Hull
Montgomery, Alabama

FOR THE DEFENDANT:

M. R. NACHMAN, JR., Esquire
ERIC BRUGGINK, Esquire
Steiner, Crum and Baker
8th Floor, First Alabama Bank Building
Montgomery, Alabama

FOR MICHAEL ORANGE and
OSI, INCORPORATED:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

FOR THE TRUSTEE:

JAMES JERRY WOOD, Esquire
Wood, Minor, Parnell & Sforzini
555 South Perry Street
Suite 100, Corporate Square
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF LUTHER H. WALLER, JR.

DEPOSITION OF LUTHER H. WALLER, JR., taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, January 28, 1980, commencing at 2:05 P.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE:

CHARLES N. PARNELL, II, Esquire
Wood, Minor and Parnell
555 South Perry Street
Suite 100, Corporate Square
Montgomery, Alabama

FOR THE DEFENDANT — First Alabama Bank:

M. R. NACHMAN, JR., Esquire
and
ERIC BRUGGINK, Esquire
Steiner, Crum and Baker
8th Floor, First Alabama Bank Building
Montgomery, Alabama

FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF SAMUEL KAUFMAN

DEPOSITION OF SAMUEL KAUFMAN, taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, January 21, 1980, commencing at 10:10 A.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE:

JAMES JERRY WOOD, Esquire
Wood, Minor and Parnell
555 South Perry Street
Suite 100, Corporate Square
Montgomery, Alabama

FOR THE DEFENDANT — First Alabama Bank:

M. R. NACHMAN, JR., Esquire
Steiner, Crum and Baker
8th Floor, First Alabama Bank Building
Montgomery, Alabama

FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF WILLIAM E. EPPERSON

DEPOSITION OF WILLIAM E. EPPERSON, taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, January 21, 1980, commencing at 4:00 P.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE:

JAMES JERRY WOOD, Esquire
Wood, Minor and Parnell
555 South Perry Street
Suite 100, Corporate Square
Montgomery, Alabama

FOR THE DEFENDANT — First Alabama Bank:

M. R. NACHMAN, JR., Esquire
Steiner, Crum and Baker
8th Floor, First Alabama Bank Building
Montgomery, Alabama

FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF WILLIAM M. JORDAN, JR.

DEPOSITION OF WILLIAM M. JORDAN, taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, January 21, 1980, commencing at 3:30 P.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE:

JAMES JERRY WOOD, Esquire
Wood, Minor and Parnell
555 South Perry Street
Suite 100, Corporate Square
Montgomery, Alabama

FOR THE DEFENDANT — First Alabama Bank:

M. R. NACHMAN, JR., Esquire
Steiner, Crum and Baker
8th Floor, First Alabama Bank Building
Montgomery, Alabama

FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF JAMES S. GASKELL, JR.

DEPOSITION OF JAMES S. GASKELL, JR., taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, January 21, 1980, commencing at 2:40 P.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE:

JAMES JERRY WOOD, Esquire
Wood, Minor and Parnell
555 South Perry Street
Suite 100, Corporate Square
Montgomery, Alabama

FOR THE DEFENDANT — First Alabama Bank:

M. R. NACHMAN, JR., Esquire
Steiner, Crum and Baker
8th Floor, First Alabama Bank Building
Montgomery, Alabama

FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF CHARLES M. HINES

DEPOSITION OF CHARLES M. HINES, taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, January 21, 1980, commencing at 3:40 P.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE:

JAMES JERRY WOOD, Esquire
Wood, Minor and Parnell
555 South Perry Street
Suite 100, Corporate Square
Montgomery, Alabama

FOR THE DEFENDANT — First Alabama Bank:

M. R. NACHMAN, JR., Esquire
Steiner, Crum and Baker
8th Floor, First Alabama Bank Building
Montgomery, Alabama

FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF THOMAS R. PEACOCK

DEPOSITION OF THOMAS R. PEACOCK, taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, January 21, 1980, commencing at 4:40 P.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE:

JAMES JERRY WOOD, Esquire
Wood, Minor and Parnell
555 South Perry Street
Suite 100, Corporate Square
Montgomery, Alabama

FOR THE DEFENDANT — First Alabama Bank:

M. R. NACHMAN, JR., Esquire
Steiner, Crum and Baker
8th Floor, First Alabama Bank Building
Montgomery, Alabama

FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF J. ALLEN REYNOLDS

DEPOSITION OF J. ALLEN REYNOLDS, taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, January 21, 1980, commencing at 4:50 P.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE:

JAMES JERRY WOOD, Esquire
Wood, Minor and Parnell
555 South Perry Street
Suite 100, Corporate Square
Montgomery, Alabama

FOR THE DEFENDANT — First Alabama Bank:

M. R. NACHMAN, JR., Esquire
Steiner, Crum and Baker
8th Floor, First Alabama Bank Building
Montgomery, Alabama

FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Caption Omitted]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

DEPOSITION OF PAUL E. NORRIS

DEPOSITION OF PAUL E. NORRIS, taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Conference Room of Steiner, Crum and Baker, 8th Floor, First Alabama Bank Building, Montgomery, Alabama, before Ricky L. Tyler, Reporter and Notary Public in and for the State of Alabama at Large, on Monday, January 21, 1980, commencing at 4:10 P.M.

* * * *

APPEARANCES

FOR THE PLAINTIFFS:

JERE L. BEASLEY, Esquire
and
FRANK WILSON, Esquire
Attorneys at Law
300 South Hull
Montgomery, Alabama

FOR THE TRUSTEE:

JAMES JERRY WOOD, Esquire
Wood, Minor and Parnell
555 South Perry Street
Suite 100, Corporate Square
Montgomery, Alabama

FOR THE DEFENDANT — First Alabama Bank:

M. R. NACHMAN, JR., Esquire
Steiner, Crum and Baker
8th Floor, First Alabama Bank Building
Montgomery, Alabama

FOR THE DEFENDANT — Michael Orange and OSI, Incorporated:

JAMES T. UPCHURCH, III, Esquire
Rushton, Stakely, Johnston & Garrett
12th Floor, Bell Building
Montgomery, Alabama

* * * *

EXCERPTS FROM TRANSCRIPT

Court's Opening Instructions to Jury

[2] THE COURT: Gentlemen, do you want the rules in this case?

MR. BEASLEY: Yes, sir.

THE COURT: Are your witnesses here?

MR. BEASLEY: Judge, we have placed the majority of our witnesses on call, so I don't believe there are any in the courtroom except Mr. Hodge.

THE COURT: All right. Let the witnesses who are here please stand to be sworn. (Witnesses sworn by the Clerk.)

THE COURT: If you will, show those witnesses where they can be comfortable, please, sir, other than representatives of the parties.

MR. NACHMAN: Your Honor, Mr. Herbert will be the bank's representative in the trial. I assume he can sit at counsel table?

THE COURT: Yes, sir. Let the jury please stand and hold up your right hand to be sworn or affirmed. (Jury sworn by the Clerk.)

THE COURT: Ladies and gentlemen of the jury, I realize that most of you have not had much experience in court and you come into court with some concern [3] about your ability to do justice to any case, if you have the sensetivity that many jurors have. I want to explain to you that there will be six of you who will eventually decide this case, and that the united brain of six people is nearly always very good. You will have a very substantial amount of time to talk about this before you finally decide it, and you will decide it after I have instructed you fully as to the law that may apply to the case. And in deciding what law applies to the case I will confer at length will all of the lawyers involved in the case.

You are sworn as jurors to apply the law that I instruct you to. If I make a mistake it is recorded here and it can be corrected by a reviewing court.

There are a number of things about this case that, perhaps, you will be less confused if I tell you about before we start. And when I tell you about the case I am going to deliberately overly [4] simplify it as best I can. The lawyers will have an opportunity at length to go into what they expect the evidence to show and what they think the law is in explaining the matters to you in their opening statement. But before they make opening statements I will tell you something of the case and something of law that you are sworn to abide by in deciding the case.

This case is a suit by Parsons Steel and Mr. and Mrs. Parsons, who are substantial owners in Parsons Steel, against the First Alabama Bank which was, as I recall it, then doing business as The First National Bank of Montgomery. The law that we are primarily concerned with which the bank is charged with having violated and the Parsons are contending that the bank did violate the law and that is the reason they have suffered substantial financial damage.

The law is that a bank shall not extend credit or fix or vary the consideration for the extension of credit on [5] a condition or requirement that the customer provide some service to such bank other than those related to and usually provided in connection with the loan service.

That is the law that applies to this case that the Plaintiff contends . . . or Plaintiffs contend that the bank violated, and they contend that because of that violation that they lost a substantial amount in the value of their property and money.

Now, they allege that the bank fixed the consideration for extending its credit based on the condition that it transfer the management of the Parsons Steel company — the company — to one of the bank's former customers, one Michael Orange,

and that this was a service to the bank by Parsons that was not usually provided and related to in connection with a loan made by the bank.

Now, the evidence will vary considerably as to precisely what happened between the parties involved in this [6] case; between the bank and Mr. Parsons, Parsons Steel Company and Michael Orange, in particular. As I understand the contention of the parties there will be evidence from which you may infer that Parsons Steel and possibly Mr. Parsons was in debt to the bank; that the debt was overdue; that Parsons Steel was seeking an extension of credit; that the bank was seeking payment of their obligation; that the management of Parsons Steel was assigned to Michael Orange, or largely assigned to Michael Orange, and that the bank allowed some additonal time for payment of the debt, or otherwise extended some credit based on a change of management, or something of the sort.

Now, after hearing possibly conflicting evidence about these and related matters you will be asked to determine whether the Plaintiff has proved to your reasonable satisfaction that, as a condition of an extension of credit, the bank required Parsons Steel or Mr. Parsons [7] to perform any service not related to and not usually provided in connection with a loan.

Now, as I have told you, it is your duty as jurors to follow the law as I have and shall state to you. And I will state some law before we start the trial and some law after the trial is started. You are not to single out one instruction to the exclusion of others, but try to give them all equal weight. You are not to be concerned with the wisdom of any rule of law, because that is up to the Congress. That is not up to me or to you. If I make a mistake about the law it is recorded and it can be corrected, hopefully. If you make a mistake about what the law is or what it ought to be and apply it, there is no way anybody can correct that, and it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given to you in the instructions of the court, just as it would also be a violation

of [8] law and of your sworn duty as judges of the facts to base a verdict upon anything other than the evidence in the case.

Now, for that reason and for some others I am going to ask you that when you are out the courtroom to avoid in every possible way gaining any knowledge about this case. It is a case that will take some weeks, perhaps, to try; certainly some days. It is a case that the news media may take some interest in. We never know for sure. But if you see or hear anything about the case either in the newspaper or on television or in radio or otherwise, avoid gaining any knowledge from it. It is impossible for you or for anybody to be sure where he got information about a case, and your decision under your sworn duty must be based on only evidence that came to you from the witness stand. Other evidence may not be dependable; there may be many other reasons why it should not be considered by you. It may be dependable

* * *

Portion of Plaintiffs' Opening Argument

[24] This company in Mobile owned outright the company here in Montgomery. The name of it is Parsons Steel Industries, Incorporated; separate and apart from the Mobile company, it was another corporation.

This corporation here in Montgomery has been doing business with The First Alabama Bank for years. First, through a Mr. Hodge, who will testify here today, and Mr. Howard, and then ultimately by the Parsons who bought them out. This had been an ongoing relationship for many, many years; a good relationship between the parties.

We expect the evidence to show that this relationship went on for this period of time under, basically, a loan officer by the name of Mr. Richardson, who will also testify in this case. He was the loan officer of The First Alabama Bank.

Now, when I say Parsons Steel Industries, Inc., — and I will refer to them as the Montgomery corporation or the Montgomery company—they were in business . . . steel business, really. **[25]** And that will be adequately explained to you. They fabricated and also sold and built metal buildings; steel buildings. It was a massive operation located here in Montgomery. It employed, ultimately, some one hundred people out there.

Now, let me just specifically tell you what happened as we understand it. Early in 1978 Mr. Parsons was negotiating with Mr. Richardson to extend the loans that had been made by Parsons Steel. The debt at that time was some one million dollars owed by the Montgomery corporation to the bank. It was secured by the assets of the company. It was also secured by land owned by the Mobile company, which was also located . . . on which the Montgomery company was actually physically located. And in addition to that, Mr. and Mrs. Parsons had individually, personally guaranteed the debt to the bank. In addition to that, the Mobile corporation had, up to a limit, I believe, of two hundred thousand dollars, guaranteed a portion of the debt.

[26] Early in '78 Mr. Parsons and his business manager at the time Mr. Whitehead met with Mr. Richardson the loan officer at the bank and told him that they wanted to extend their loans; put them on a long-term basis so that they would actually be a better loan for both the customer and the bank, and that they would need some additional captial because of the new phase of the business; they were changing over. He told them they would have a cash flow problem during the year '78. Mr. Richardson understood it. The relationship was good.

This rocked on during the year '78 until the point in time when Mr. Richardson was leaving the bank. Now, we expect the evidence to show clearly, without any doubt, that up until this time there was no dispute by the bank as to this being a good loan, as to the Parsons being good customers. In fact, we

want you to look very closely at the bank records, and you will find that even in August of 1978 **[27]** the bank did a routine review of this loan and said that this, in effect, is a good loan; didn't list any deficiencies with the exception of one which has absolutely nothing to do with this case. And this was done by an employee of the bank who was not the regular loan officer, to give them some independent objectivity to make sure the loan officer was doing his job.

Now remember this date, August of 1978. They had been negotiating the loan and the restructuring, and so forth, up to that point. Mr. Richardson was leaving. So, later, between then and November; Mr. Richardson was leaving the bank and he turned over the loan to Mr. Herbert, who is sitting here at counsel table in the blue suit on the far end over there with his lawyers. Mr. Herbert comes into the picture, and just about the same time another third party comes into the picture.

Now, remember this name, also. It is going to be real important in your deliberations. This other name was **[28]** Michael Orange; Michael Orange. Who had been a very good customer of the First Alabama Bank who was on a personal basis with the president of the bank. In fact, the president had been looking for a business for Mr. Orange to buy to go back into business here in Montgomery. And this had been a relationship between First Alabama Bank, Defendant, and this Mr. Michael Orange.

Mr. Herbert comes in and the negotiations continue. And, remember, Parsons had been owing this money—a million dollars is a lof of money, but this was a big business, also, with a great deal going on out there, and it was a good customer of the bank. Mr. Herbert comes into the picture and he tells Mr. Parsons, "I want you to bring in financial information; we are negotiating the loan, the restructuring, putting it on a long-term basis with a definite payout, additional captial funds for the various things that you use capital money for.

So, this was, say, in the latter [29] part of November. Say, November the 30th the statement was made, the inventory was taken.

In the meantime, there was some talk of a sale to an out-of-state company of the Montgomery company. Mr. Herbert says to Mr. Parsons, "Don't sell to them. We prefer to do business with local folks." And Mr. Parsons says, "Fine." He continues to negotiate.

Remember this date—and I hate to keep throwing dates at you, but this is important. In the bank's records of November . . . rather, December 6th of 1978, in the bank's own records is a statement by Mr. Paul Norris, and here is what it says: We are presently negotiating with Jim Parsons the restructuring of the Parsons Montgomery company's debt. That is in December of 1978.

Now, Mr. Parsons brings the information in and here is what Mr. Herbert says: "No more money. We are not going to step further with you unless you bring Mr. Michael Orange in as manager of your business." [30] As president, if you will. "And also give him a majority position of the ownership of your stock, and then you can get all the money you want", in effect. Mr. Parsons had a hundred folks out there working for him and had an ongoing business. It shocked him. He agreed to it; had no choice.

And this is the econompic power we are talking about. He became dependent, that business was dependent on that bank, you see, when that condition was placed. Just as the Judge has told you, the condition is that you can not place something on a customer that is not a usual banking practice as a condition or a requirement for the extension of credit. And that is exactly what we have in this case.

Now, then is when the strange things started happening. Mr. Parsons and Mr. Orange, the new president—and by the way he

received 55 percent of the stock...option to purchase 55 percent of the stock for one hundred dollars—was made president and chief executive officer **[31]** of the company and signed a document with Mr. Parsons to that effect. Then they go to a local lawyer, another lawyer, a friend who had known Mr. Orange prior, Mr. Luther Waller. He fixed up these papers and then they went to another lawyer in the same firm and they sent a letter out to the creditors of the company. And you will hear all of the testimony about this. This was on the 21st of December.

Now, from the 21st of December—remember, we have got Christmas coming up; the holidays—since the 21st of December up until, say, the 5th of January, the creditors, the other creditors, the trade creditors, are being notified. There was a substantial debt to outside folks in any business...in this business.

So, January 5th Mr. Herbert for the bank put into operation a plan that Mr. Jimmy Gaskell will testify to you had been devised by the board of directors of this bank. And this plan was this: That we will send a letter out to the creditors—**[32]** we will call it the Kaufman plan. The lawyer was Sam Kaufman—we will send a letter out to the creditors of this company and more or less give them some information on the company and hope they accept it and then everything will be fine.

But there was a contingency plan in the wings. And here is the contingency plan: That if this plan doesn't fly then we will sell the business on a private sale to Michael Orange, the man who had been placed in the business by the bank, the friend of the bank, the customer of the bank who had gone in and gained the confidence, I assume, of Mr. Parsons, and became his president, and, really, own the company, you might say; on an option to purchase it. And this is the man who winds up with the business. Winds up with the business. And here is the way it happened: On the 8th day of January, just days after the com-

position letter went out, and the deadline for the creditors to accept it was the 15th of [33] January—remember that date.

On the 8th day of January the bank calls the Parsons loans; calls it. You have to pay it, and gave them notice.

Now, from that point forward, from the 8th to the 17th, it was all over. And here is the strange thing. And this will be testimony that will be given to you. Mr. Orange creates a new company, a privately owned corporation that he and his family owned, and I assume still do. The bank loaned them, quietly, 1.3 million dollars, I believe, was the amount. 1.3 million dollars. That was on the 12th day of January. Mr. Orange didn't have to put a dime into it; not a dime. That 1.3 million was, in effect, unsecured. In fact, Mr. Orange didn't even sign the note. He just had a new corporation, a thousand dollars capitalization and he borrowed from that bank 1.3 million.

Then on the 17th day of that same month he buys at a private sale all the assets of Parsons Steel. Parsons loses his business, loses his land—and that [34] is land of considerable value which was pledged to buy the Mobile corporation for that debt—loses the value of his stock, loses his business and they have to go bankrupt.

So, that, basically, is what the testimony will be. I haven't gone into all of it, but it is really complicated. And perhaps I have confused more than I have helped you. But I have tried to give a brief outline of what happened and how the bank in this case has abused, grossly abused its economic powers over its customer.

And we believe that after you have heard the evidence that you will be satisfied that the bank brought Mr. Michael Orange in, portrayed him as a potential purchaser of that business for a fair price, in the beginning, and then the true colors came out. And we find Mr. Orange placed there, an insider for the bank, so that he could gain the information required to buy it, in effect, for nothing. For nothing.

Our clients have lost, they have been [35] damaged. The bank and Michael Orange have gained. And we submit to you that after you hear the evidence, without question, that your verdict will be for the Plaintiffs in this case.

I thank you.

* * *

Portion of Defendant's Opening Statements

[37] the evidence to show that Mr. Parsons stated falsely about this matter in order to get bank credit. He said he owned 98 shares of the business. He didn't. His wife owned 98 shares of the Mobile company. He owned one and a third party named Gaston owned the other.

No, the act that we are concerned with here, the act of Congress, is what is called an antitrust type statute. Now, the antitrust laws for most businesses were passed many years ago, back at the latter part of the last century, in the 1890's. And, essentially, what those laws were designed to do was to protect free competition so that free enterprise and free competition, which we feel in America is the best kind of economy to have, could prosper and that companies couldn't combine with each other to set prices to put other companies out of business, and to do other practices, among them, practices called tying arrangements. And this gets to the statute we are talking about regarding banks.

[38] Tying arrangements, as the Court, I am sure, will charge you more fully at the conclusion of this case, is a situation where a business says, we won't sell you this product unless you agree to buy some other product from us, too. And because, when companies with economic power exercise that kind of tying arrangements it meant that competition between the tying products was not as free as it might be. And that would mean that prices might be artifically fixed on the rest of it.

Now, in 1972 Congress said to banks, you cannot engage in tying arrangements. You can't, as for example, tell an automobile dealer, "We will lend you so much money providing you, Mr. Automobile Dealer, will discount all your automobile papers at our bank." Or a banker couldn't say, "We will lend you some money on some real estate provided you use X or Y real estate agent and nobody else as your agent." Provided, also, that the real estate agent was a customer of the bank.

Now, that is the kind of practice **[39]** that we are talking about here. That is the only kind of legal violation that is alleged here. We respectfully submit that Mr. Beasley is in error when he stated to you a few minutes ago that the purpose of that act was to prevent the bank from using its economic power to have a customer do something that was not in his best interest. You will search the statute in vain for any such purpose as that. The purpose was and is to prevent the use of this tying power. And Congress was very careful in making plain that it was not talking about the usual kind, the traditional kind, the sound of banking practice which is necessary to secure a loan; a mortgage, for example; a personal guarantee where a small closely held corporation was involved. And we submit that we will show to you that among the practices that are absolutely essential and they are reasonable is if somebody is lending money to a business and the business is being run into the ground and improperly managed and if as a result of that the **[40]** company isn't able to pay its trade creditors or the bank when the bank has a loan and trade creditors are extending credit to the steel

companies so it can get steel to manufacture and sell its product. Then if that business wants some more money or if it is in default on loans that are already outstanding and it says, "Don't foreclose on these loans", or it says to the trade creditors, "Don't try to get your steel back", it is perfectly sound, usual practice for a bank or any other creditor to say, "Look. We are not satisfied with the way this company is being run. You owe us a good bit of money. You aren't paying the money. You aren't paying the interest on the money and we are not going to lend you anymore money because we think this company is improperly managed. If you get some new management in and we have confidence in the new management then we will lend you some more money." And that is all this case is about, ladies and gentlemen.

I will now trace a little bit of the **[41]** facts and background. And you will see that they are in pretty sharp contrast to what Mr. Beasley has told you. Of course, the Court has already told you that what he says and what I say, that is not evidence in the case, and you will judge the case as it develops based on the evidence that comes from that stand. But let me tell you what we expect to show.

We expect to show that sometime beginning in 1978 that contrary to there being any sort of renegotiation for any further loans, that because of practices which we say are deluding and self-serving and diverting money from that company and property from that company for this man's personal use rather than to his creditors and to pay off his loans —

MR. BEASLEY: Your Honor, we object.

THE COURT: Overruled.

MR. NACHMAN: That that loan got into serious trouble. And that in conferences with Mr. Richardson who at that time was with First Alabama Bank — and he will testify —

* * *

Portion of the Testimony of Edmond W. Hodge

[72] A. Yes. It was considerably.

Q. Did you have an opportunity to go out to the plant site from the time you sold the business up until, say, December of 1978? A. Yes.

Q. How often would you go out there? A. Roughly, once a month.

Q. And while you were there would you make any spot checks on inventory, or look around the place? A. Yes. I would walk through the warehouse and through the plant.

Q. At anytime did you see any accumulation of scrap that, in your opinion, would be worthless or — A. No. Not more so than is normal in the business. You always generate some scrap but, normally, that is sold to some local scrap dealer and it is moved out periodically.

Q. Then what you saw was the usable inventory? A. Yes, sir.

Q. And that was continuously throughout that period? A. That is correct.

Q. Would you tell the Court and jury approximately how many metal buildings were located on the some 20 acres that made up the Parsons Steel Industry operation there? [73] A. Well, there were actually three buildings, separate buildings. The main plant area consisted of four bays.

Q. Four bays? A. Right.

Q. What is a bay? A. A bay . . . this room would be considered a bay if you put another room next to it and stacked them up.

Q. And what would happen in these bays? A. That was the manufacturing.

Q. The manufacturing process? A. Right. The machinery was in there and the employees worked in there.

Q. Would you tell some of the types of equipment that would be used in this manufacturing business? A. Well, shers, decoilers, press brakes, drill presses, punch presses.

Q. Would these be small or massive pieces of equipment? A. They are large pieces of equipment.

Q. Was the equipment and the physical plant itself in reasonably good shape, as far as you know? A. Yes, sir. Very good shape.

Q. Very good shape? A. Right.

Q. Did you have any financial interest in the business

* * *

[82] the situation that I described to you would be a normal or ususal banking practice? A. The only thing I can say is that I have never heard of it.

Q. You have never heard of it? A. No.

Q. And you have been in business for how long? A. Since 1948.

Q. All right. During the fall of 1978 did you have any knowledge from any source whatsoever that Mr. Parsons was negotiating with First Alabama Bank for additional funds? A. No.

Q. You never had any discussion with Mr. Herbert or anyone concerned with that? A. No.

Q. And I believe you testified that you had been out on the premises of the Parsons operations here in Montgomery on numerous occasions? A. That is correct.

Q. Would you have also been out there during the period of time, say, October, November, 1978? A. Yes, sir. That is correct.

Q. Would you have had an opportunity to observe the inventories on hand at that time? **[83]** A. Yes.

Q. And how would you describe them at that point in time? A. They were large.

Q. Large? A. Too large, I think. Yes.

Q. Would they have a value? A. Yes. I would think they would have a value.

Q. Would any of it been considered scrap, other than in small amounts? A. None that I saw.

Q. In other words, it would have had whatever the market value was at that time? A. That is correct.

Q. And I believe you stated that you thought the inventory was, perhaps, too large? A. Yes, sir.

Q. Would any part of the inventory have been steel that could have been sold on the market? A. No. Not at a price.

MR. NACHMAN: I didn't understand that answer. A. It could have been sold at a price.

Q. (Mr. Beasley continues) Would that price have been whatever the market was at that time? A. Yes. That is correct.

[84] Q. Not for scrap purposes? A. No.

Q. Or not for distressed sale purposes? A. No.

Q. What is a distressed sale? A. A distressed sale, in my opinion, would be a sale that was forced and in which you would have to take below market value.

Q. But this was steel that could have been sold on the market without any difficulty, then, in your opinion? A. Yes.

THE COURT: Mr. Beasley, I am going to let you call the next recess anytime you think we ought to have one.

MR. BEASLEY: I have one or two more questions, and I will be through with this witness.

THE COURT: All right.

Q. (Mr. Beasley continues) Mr. Hodge, have you, to this date, received your guaranty back from the First Alabama Bank? A. No.

Q. Have not? A. No, I have not.

Q. Have they contacted you about it? A. Not at all.

* * *

Portion of Testimony of Jimmy Douglas Parsons

[284] MR. BEASLEY: We offer Plaintiff's Exhibit 36.

THE COURT: It is admitted.

Q. Mr. Parsons, would you briefly describe the nature of the actual plant site itself; the land, the buildings, the type of equipment that would be inside those buildings? A. Well, the area covers about twenty-five acres, more or less. The buildings are approximately a hundred square feet. They are very wide and very long and very high, and the equipment is contained within the buildings. We have some very large pieces of equipment and some average size. But it a very large industrial plant.

Q. The coils that Mr. Hines described this morning, which weigh some five tons — A. Yes, sir.

Q. — of your knowledge, what would be the largest number of coils that you would have had in inventory at any one time? A. We have two types of coils and I will give you a total of both, if you like. You have painted coils and then you have unpainted coils. So —

Q. Explain to the Jury exactly the difference in a painted coil and unpainted coil, what it is used **[285]** for, and its value and so forth? A. Well, a painted coil is a pre-painted baked on material . . . like an automobile finish, but it comes from a steel mill. And it is a special process that will allow you to fabricate that, to some degree, after it is painted, such as making siding for buildings or roofs for buildings; you can acutally make that product after it is painted. So, that is what it is; it is a pre-painted material. But it is used primarily for buildings, for roofing and siding and trim.

Unpainted coils, on the other hand, range from the very thin type that is used in basic sheet metal applications, manufacturing, maybe, a typewriter or a calculator — it is something of that type, just for identification — up to pieces of material three-eights of an inch thick which you would use in the structural part of, maybe, a farm implement or structural columns for some buildings; that type.

So, there is a big difference between the two. The painted material is very expensive material. The unpainted material is moderately priced.

Q. How many painted coils have you had on hand at any **[286]** one given time; the largest number that you can recall, in your best judgment? A. As many as a hundred.

Q. And what would be the approximate value, say, if you can, give me a date when you could pick a value to place on those coils? A. Well, considering that they weigh about five tons — ten thousand pounds each — then you have five hundred tons, and it sells for thirty-three cents . . . slightly over thirty-three cents, the cheapest that we ever bought, so that is . . .

Q. What about the unpainted coils? A. The unpainted coils, we wouldn't have as many in numbers, probably, at any given time, not more than thirty-five to fifty. But weight-wise, generally they were more. They were, like, seven and a half to

eight tons. Sometimes they got very heavy and they were really hard to handle. We tried to limit it to twelve thousand pounds, but the steel mills were always making them heavier.

Q. At any time during the year 1977, did you have any coils on hand that could not be used or had no market value? A. Well, I am sure there was an occasion during 1978 that we might have had one or two coils that came

* * *

[288] Q. Let's go back to January of 1978, the meeting with Mr. Richardson. Can you tell the Jury from that point forward if Mr. Richardson ever at any time told you that...refused to make any additional loans to Parsons Steel? A. Mr. Richardson never refused to make a loan to Parsons Steel. Late in 1978 he put some stipulation on it, but he never refused to make a loan to Parsons Steel.

Q. What type stipulation did he place on the loan? A. In either September or October of 1978, I had an option to either give a second mortgage on my residence, my home, or have a capital input into the business of a hundred thousand dollars.

Q. Did you agree to give the second mortgage on your house? A. No, sir.

Q. Did you refuse to do it? A. Yes, sir. I was insulted.

Q. What about the second alternative, the transfer of a hundred thousand dollars in additional funds into the company? A. Yes, sir. We agreed to do that.

Q. You agreed with Mr. Richardson? A. Yes. I agreed that I would do that.

* * *

[293] MR. BEASLEY: We will offer Plaintiffs' Exhibit 14.

THE COURT: It is admitted.

Q. (Mr. Beasley continues) Did you sign a personal guaranty in connection with that note, also? A. Yes, sir, I did.

Q. All right. Did Mr. Richardson voice any concern at the time you made these two notes, the last one being in October of 1978, to you? A. No, sir. Not concern.

Q. Any reservations about making the loans? A. No, sir. At this particular time, we were right in the midst of negotiating a different loan, so he wasn't...

Q. Would you tell the Jury exactly what the negotiations were between you and First Alabama Bank at this particular time that you just referred to? A. In October?

Q. October of '78? A. Mr. Richardson and I had been talking, certainly, in the last month or so prior to this about renewing a long-term note, that we had had for a couple of years. The note was a half a million dollar note, and it had been paid down to about a quarter of a million dollars, maybe slightly less than that,

* * *

[305] ... Q. Never at any time? A. No, sir.

Q. Did Mr. Herbert at any time prior to Mr. Richardson leaving the bank ever tell you that the bank would extend no further credit? A. No, sir.

Q. At that time, were the loans that you have discussed, the notes that were renewed as late as October of 1978, were they due and payable at that time? A. In December?

Q. Yes, sir. A. Some were coming due and some were due.

Q. And at that time, if I understood your previous testimony, you were negotiating with the bank for long-term financing and additional funds? Is that correct? A. Yes, sir. That is right.

Q. And that would be with Mr. Richardson and then with the next man who took over, Mr. Herbert? A. Yes, sir. That is correct.

Q. Mr. Parsons, did Mr. Herbert at any time place any special conditions or requirements on you as the loan customer as a condition or requirment to **[306]** extending that credit? A. In a meeting with Mr. Herbert on December the 12th, the requirement of accepting Mr. Orange, Mike Orange, as manager and principal owner of the business was placed, if we were to receive any additional financing.

Q. And that was done by Mr. Ed Herbert? A. Yes, sir.

Q. Had you at any time ever been aware of the fact that this bank was going to place this requirement on you? A. No, sir. Not at all.

Q. Had you at any time had any dealings with Mr. Michael Orange prior to this date? A. On...Well, when you say dealings? No, sir. Never had any dealings with him.

Q. Had he at any time been out to your place of business prior to this? A. Yes, sir. Visited the plant once.

Q. And what was the reason for that visit? A. He came to look the plant over as a prospective buyer at the request of Mr. Herbert.

Q. How did that information come to you; that he wanted to look it over as a prospective buyer? A. Mr. Herbert called me and asked me were we still interested in selling the plant, and I told him, no.

* * *

[309] Q. At whose request? A. A combination of two. We were in the midst of negotiating with the bank on the restructuring of the existing debts and borrowing some additional money. And, Mr. Herbert asked as a part of the November statement to have

a physical inventory of the assets; of the material; actual inventory of the steel that we used.

And Ajax Atlas, of course, the buying of the business, coincided with that. So they came down and also monitored it. But it was a combination...The reason was a combination of the two.

Q. When was this carried out; the actual physical inventory? A. Thanksgiving week of November, which would be, I thing, the very last week of November.

Q. How long did it take, if you recall? A. The physical counting of it took the better part of a week for...I am going to guess, about twenty-five people. Not less than twenty and probably no more than twenty-five.

Q. Were any people outside of your immediate employees involved in this inventory? A. You mean the actual counting of it?

Q. Actually participated in the counting or verifying?

* * *

[316] Q. Of 1978? A. Yes, sir.

Q. Now, did Mr. Herbert, on behalf of the bank, tell you that if you took Mr. Orange in as he proposed, that additional funds would be available to the company? A. Yes, sir, he did.

Q. What exactly, did he tell yoiu? A. He told us that if we accepted Mike Orange as a principal in the business, he would make available any amount of money that the company needed.

Q. And this was conditioned on Mr. Orange's presence in the business? A. Yes, sir. That is right.

Q. All right. Had you made an offer to sell the business to the company. Ajax Atlas, the out-of-state company, that you testified about yesterday? A. Yes, sir, we did.

Q. What was the proposed sales price that you made to them? A. In the final analysis, it would have been approximately one point five million dollars.

Q. All right. What would they have received had they accepted that offer? A. They would have purchased all the assets of the business

* * *

[331] was my meaning.

Q. Had there been any adjustments in the inventory figures, to your knowledge, prior to this letter going out? A. Enormous adjustments. Yes, sir.

Q. Which direction? A. Downward.

Q. By whom? A. Mr. Orange.

Q. Did Mr. Orange have any knowledge of the steel business, to your knowledge? A. No to my knowledge.

Q. Did he appear to know anything about the price of steel or types of steel, or what gauge would be involved, or . . . for example, what a coil would have been? A. He told me he knew nothing about it at all.

Q. And he was the gentleman who adjusted downward the inventory figures? A. Yes, sir. That is right.

Q. And these would have been the coils that Mr. Hodge testified to that he observed during the month of December, and I believe he described the types of coil and the weights of those coils?

And you stated the value of them, I beleive, in your direct testimony yesterday?

[332] Q. Now, let me ask you this question: Mr. Parsons, if you had known in September or October of 1978 that the bank was going to refuse to give you additional funds in the form of a loan, could you have sold enough inventory to ease your cash flow problem?

MR. NACHMAN: We object to that, Your Honor.

THE COURT: Restate the question, please, sir.

Q. (Mr. Beasley continues) Mr. Parsons, had you known during the month of September —

THE COURT: I will sustain the objection.

Q. (Mr. Beasley continues) Mr. Parsons, did the inventory . . . amount of inventory, decline at any time substantially from the month of, say, September up until the month of December? A. No, sir. Not at all.

THE COURT: Not what? A. Not at all.

Q. (Mr. Beasley continues) What was your role in the company during the period of time, December 21, 1978 through, say, January 5 of 1979? A. My role?

Q. Your role? A. Mr. Orange was primarily preoccupied with this letter. And, so, I was expected to —

[333] MR. NACHMAN: Your Honor, we object to that. That is not responsive.

THE COURT: I sustain that. You have to answer his question. A. Yes, sir.

THE COURT: Not go into something else. A. Yes, sir. I was charged with the daily operations of the plant.

Q. (Mr. Beasley continues) Did you have anything to do with the management of the company during this period? A. No, sir. I mean, as far as running the plant, yes, sir. But as far as management decisions concerning the company, none.

Q. All right. When was the first date on which you learned that the bank had a foreclosure in their mind, or that they were planning foreclosure?

MR. NACHMAN: We object to that, Your Honor.

MR. BEASLEY: I will rephrase the question.

THE COURT: What —

MR. NACHMAN: He is asking about the undisclosed mental operations of the bank.

[334] THE COURT: I think he asked when he first became knowledgeable of the foreclosure. Isn't that what he was asking him?

MR. NACHMAN: No, sir. He asked him when the bank had it in mind.

MR. BEASLEY: I will rephrase the question if there is any question about it.

Q. (Mr. Beasley continues) Mr. Parsons, when did you first learn that the bank was going to foreclose on Parsons Steel? A. I think it was January 8, 1979.

Q. How did you learn this? A. I visited Ed Herbert in his office.

Q. What did he say to you on that date? A. He said, "If you are not going to go along with it any more, we are going to close it down."

Q. Close it down? A. Yes, sir. We are going to foreclose.

Q. And that was on the 8th day of January of 1979? A. Yes, sir, as I recall.

Q. Had there been any mention to you at any time prior to that date by any person with the bank that they were going to foreclose? A. No, sir . . . Well, yes, sir. At one time there was

an argument between Mr. Richardson and myself, in **[335]** September, I think, and he said if I was not willing to give my house . . . a second mortgage on my home, that he would foreclose. And I said, "Fine. Here are the keys. If this is what we call our friendly foreclosure." But we got over the argument and it was never mentioned again.

Q. Was that a personal argument between you and Mr. Richardson? A. Yes, sir; personality conflict of the moment.

Q. I assume you took offense because he wanted a second mortgage on your house at that time? A. Yes, sir. I was upset.

Q. Is that when the alternative plan was propsed; the influx of funds into the company? To shore up the cash flow? A. Yes, sir. It was an alternative that we both agreed on.

Q. And that was satisfactory to Mr. Richardson? A. Yes, it was.

Q. Was there enough inventory on hand in January of 1979 to have paid off the problem areas of your company's debts had you had the opportunity to do it? A. In '79?

Q. January of 1979? A. Yes, sir.

[336] Q. Now, what type sale would this have required to achieve the result it would have to be; to pay off these debts? A. What type of sale?

Q. Yes. A. The material would have had to have been offered to people in a like business; people in the steel business who would use the material. It would be an open market item, but certainly limited to the people who used it.

Q. Would these have been items that other persons in the steel business could have used in their business? A. Oh, yes, sir, all of it.

Q. Then Mr. Hodge was correct when he said that just about every . . . excuse me.

MR. NACHMAN: I just wanted to object when you finish the question.

MR. BEASLEY: Well, I hadn't asked a question.

MR. NACHMAN: I understand.

Q. (Mr. Beasley continues) Was the inventory on hand marketable in January of 1979? A. Yes, sir.

Q. And this would have been . . . any person who had visited the plant with a knowledge of steel, could **[337]** have seen that. Is correct? A. Yes, sir.

MR. NACHMAN: We object to that, Your Honor; what any person could have seen who was knowledgeable in steel.

THE COURT: I can't hear you, Mr. Nachman.

MR. NACHMAN: The question is what any person could have seen who was knowledgeable with steel. And we think that is a highly speculative question and we object to it.

THE COURT: I will sustain it.

Q. (Mr. Beasley continues) Had Mr. Orange made any attempt to get out of his role with Parsons Steel Industries along about this time in January of 1979? A. Yes, sir. In . . . After my meeting with Mr. Herbert, Mr. Orange —

THE COURT: Which meeting? A. January the 8th meeting.

Mr. Orange wanted to resign as the chief executive officer of the company.

Q. (Mr. Beasley continues) Did you report back to Mr. Orange that the bank had foreclosure in store for the company? A. Yes, sir.

* * *

[363] A. He was still in charge.

Q. Weren't you the president of the company after he resigned? A. I don't think that has ever been answered for sure. I wasn't in charge. No, sir.

Q. Well, who was in charge after Mr. Orange resigned? A. Mr. Orange.

Q. He continued to operate the business? A. Yes, sir.

Q. Did you ever suggest to him that all the inventory be liquidated to pay off the bank and avoid foreclosure? A. Yes, sir.

Q. You suggested that to him? A. Yes, sir.

Q. And you suggested it to the bank? A. Yes, sir.

Q. You told the bank that you could liquidate these inventories and pay off its obligations and that Mr. Orange wouldn't let you do it? A. No, sir.

Q. I didn't think you did. A. But I told the bank way before Mr. Orange came into the picture that —

Q. That is not my question, Mr. Parsons. My question [364] is: When you had this conversation with Mr. Herbert on January the 8th, 1979, about foreclosure, did you tell him that there was ample inventories to pay off the obligations to the bank and that you were unable to do so because Mr. Orange wouldn't let you? A. No, sir. I didn't tell him that on that day.

Q. Now, am I not correct — going back to September of 1978 now — that Mr. Richardson, who was then the bank person who was in charge of your loans, made it plain to you that there would be no further extension of credit to the Montgomery Parsons? A. You are not correct.

Q. He never made that plain to you? A. No, sir. He did not say that at all.

Q. Did he tell you that there would be further extensions of credit? A. Yes, he did.

Q. In what amount? A. We were going to renew a long-term note from approximately two hundred eighty thousand dollars to three hundred thousand, from that amount to six hundred thousand. Which would have given us as least a quarter of a million dollars in net money.

Q. But those were existing loans, weren't they, that had gone on for some time before and had been

* * *

[367] dollars or not that the bank was committed to lend you? A. We did not know the exact dollar amount of the proceeds we would get from the renewal of the note, but we both understood it would be approximately a quarter of a million dollars.

Q. And what rate of interest? A. I don't recall the interest rate. I think it was prime plus one and a half or two.

Q. And what was the term of the loan to be? A. As I recall, it was to be set up on five years but the payments were to be as though it was on a twenty year . . . or ten year. I don't recall the exact terms. But, basically, the same as it was.

Q. And when was that done? When did you and Mr. Richardson reach that agreement? A. In September.

Q. Of 1978? A. Yes, sir. That is right.

Q. Now, I am not talking about the agreement to extend the existing notes. Now, do you understand the difference? A. Yes, sir.

Q. All right. Did you ever pursue that with Mr. Richardson after September?

* * *

[380] is. Is that meeting the one I asked you the several questions about? A. Yes, sir.

Q. Now, before that time, as I understand what you are now saying, Mr. Herbert told you about Mr. Orange's interest... possible interest in purchasing. That was before you had these loan conversations? A. Yes, sir.

Q. All right. What did he tell you in that conversation about Orange? A. He called me on the phone, to begin with; I didn't meet with him. He called me on the phone and said, I have a fellow...he said, "Are you still interested in selling the plant?" And I said, "Well, no." For the reasons of the employees, I said, "No. We are just not going to go through that again." That was after I had met with him at the plant, so I had no... well, anyway. He said, "Well, the bank has an old customer that we would like to come out and take a look at it, and if he wants to buy it he can just write you a check for whatever amount you would want to sell if to him for."

Q. He said Orange was an old customer? A. Yes, sir.

Q. Did he use that phrase?

* * *

[392] Q. And what did...Mr. Herbert then told you that Mr. Orange was interested in a management proposition? A. No, sir. Not like that.

Q. Well, he did indicate that; transmit that information to you? A. Well, yes, sir. He transmitted the information that Mr. Orange was interested in management of the company.

Q. Yes. And then did you and Orange get together and discuss the matter? A. Yes, sir.

Q. Did Herbert do anything other than tell you that Orange was interested in, perhaps, some management arrangement? A. Did he do anything, sir?

Q. Say anything? A. Did he say anything?

Q. Or do anything or give you any other information other than that? A. Yes, sir. He said that unless you are willing to take Mike Orange in as a principal of this business, the bank will go no further. That is it.

Q. And that meant what? A. Well, that the bank would go no further, and that was

* * *

[396] Q. Did anything happen to your inventories to make them less saleable between December the 12th, 1978 and January the 8th . . . indeed, January 15th, 1979? A. No, sir.

Q. They were just as marketable on the December date as on the January date, weren't they? A. Yes, sir.

Q. So, at some point you and Orange, then, started talking about management. Right? A. When you say management, do you really mean talking about transferring the stock or how he was going to head the company up? I am not sure.

Q. Well, it is the same thing, isn't it? A. Well, yes, sir, it is in a way. But, then, no, it is not. Larry Whitehead was the general manager but he had no stock options or stock interest in the company and was an officer of the company. But we didn't negotiate his management position. We negotiated the stock.

Q. Well, let me ask you this: When this letter that Kaufman wrote . . . Mr. Kaufman wrote on the 21st of December, 1978, he was the company's lawyer, your company's lawyer, was he not, when he wrote that letter? A. He was employed by Mike Orange, yes, sir. So —

* * *

[420] A. Well, I had a Mark IV. Yes, sir.

Q. Had belonged to the company and was transferred to you. Is that right? A. I think that is right. Yes, sir.

Q. And weren't the books adjusted to show that as a year-end bonus to you as president of the company? A. I am sure it would have reflected it. And if that is it, that is what it reflects.

Q. Now, you did agree to waive notice for the foreclosure of these assets and agree to a private sale of assets rather than an auction, did you not? A. I didn't agree to anything. I signed whatever Mr. Herbert asked me to sign.

Q. I beg your pardon? A. I didn't agree to anything. I only signed whatever Mr. Herbert asked me to sign.

Q. Well, you knew what you were signing, didn't you? A. Not really. No, sir.

Q. You didn't read it? A. No, sir.

Q. Did you have a retained attorney at that time? A. No, sir.

Q. How about a fellow named Farley Moody in Birmingham? A. No, sir. He was not a retained attorney at that time.

[421] Q. To refresh you recollection, let me show you Defendant's Exhibit 18.

MR. NACHMAN: We would like to introduce that, Your Honor.

MR. WILSON: We object to it, Your Honor.

THE COURT: On what basis?

MR. WILSON: On the basis it contains hearsay statements.

THE COURT: Well, I would have to look at it and talk with you about it. Let's get around here with the Record.

(Whereupon, the following side-bar conference was had out of the hearing of the Jury:)

THE COURT: I presume that this is a letter that came to them from him, is it not?

MR. WILSON: Yes, sir.

THE COURT: I think he would have to explain it. I will overrule your

* * *

[425] Q. Yes, sir. A. The dates are incorrect.

Q. I see.

Now, did you, after the transaction was closed — by that I mean the foreclosure was completed — did you express either to Mr. Herbert or to Mr. Orange that you were delighted with the outcome of everything that had occurred? A. I have never used the word delighted.

Q. That you were satisfied or pleased? A. All I said to Mr. Herbert when I walked out the door was, "I am glad this is over" period.

Q. You didn't say you were delighted? A. No.

Q. You didn't say you were pleased? A. No, sir.

Q. Now, the fact of the matter is, Mr. Parsons, you obtained some significant financial advantage by what occurred, did you not? A. No, sir. That is not the fact of the matter.

Q. Isn't it a fact that you were relieved of a personal guaranty to pay a hundred and seventy-six thousand dollars to Mr. Hodge? A. Yes, sir. That occurred.

Q. That eliminated that. Right? **[426]** A. Yes, sir.

Q. And you also were relieved of your personal guarantees to the bank on these notes, were you not; these three notes?

Do you know the three I am talking about? A. Yes. By virtue of the fact that there was no money owed the bank I was relieved of that guaranty. Yes, sir.

Q. And your wife was. Is that right? A. Yes.

Q. And the Mobile company was relieved of an obligation . . . of a guaranty obligation of some two hundred thousand dollars. Isn't that correct? A. Yes, sir. That is correct, too.

MR. NACHMAN: Your Honor, could we have a side-bar conference on a matter that I am fixing to go into?

THE COURT: Yes, sir.

(Whereupon, a side-bar conference was had between Court and counsel, out of the hearing of the Court Reporter, after which the following occurred of Record:)

THE COURT: Speaking of the next recess, I am thinking about taking a recess about twelve o'clock or shortly before

* * *

[428] Q. (Mr. Nachman continues) You mentioned something about your inventory being marketable. Am I not correct that there was a certain change in your business, in the type of fabrication that your business would produce, that made some of your steel materials less than marketable, at something less than their actual price? A. No, sir.

Q. Didn't you have certain changes in your business so that some of your inventory didn't meet standard building codes? A. No, sir.

Q. That never occurred? A. No, sir.

Q. When an inventory was taken in connection with this Ajax Atlas matter . . . do you remember your testimony on that? A. Yes, sir.

Q. Was there any evaluation attempt made there or was that just a piece count? A. Both.

Q. Did you treat certain receivables as so-called "litigation receivables"? A. Yes, sir.

Q. About what proportion of your receivables were they? **[429]** I am talking about as of November 30th, 1978? A. I don't recall the exact amount, but a large portion would be subject to litigation.

Q. And does that mean that the people you said owed you money said that they didn't owe you money, and you all were in court on that proposition? A. Well, yes, sir. It meant that there was a problem of some type on the receivable.

Q. In other words, you were saying to somebody that you said owed you money, "You owe me so much money," But that person was saying, "No, I don't." And, so, you all were going to litigate the matter? Is that what you mean by litigation receivables? A. Yes, sir, in simple form.

Q. Now, on your November statement, Plaintiffs' Exhibit 9 which is in evidence, is there any notation or distinction or any other indication on that statement that any of your receivables were in that litigation category? A. No. There is no indication on the statement that they were in litigation. No.

Q. But a substantial portion of the receivables shown on this statement were in litigation. Is that correct? A. A portion . . . yes. A substantial portion, but I **[430]** don't know the exact amount.

Q. Did you consider that to be in accordance with generally accepted accounting principles, that litigation receivables aren't so indicated on a financial statement? A. I can't answer that.

Q. You can't answer that.

Now, am I not correct that the inventories which are shown on this Plsintiffs' Exhibit 9 were written-down some one hun-

dred sixteen thousand dollars on the statement as of December 31, 1978?

MR. WILSON: We object.

THE COURT: What is the basis for your objection?

MR. WILSON: A matter not before Mr. Herbert at the time the condition —

THE COURT: A what?

MR. WILSON: It was not before Mr. Herbert at the time the condition was made by him.

THE COURT: What was not before him?

MR. WILSON: The entry in the financial statement that Mr. Nachman —

THE COURT: Wasn't it before him? We have been talking about it?

[431] MR. WILSON: Not any December entry, Judge. This occurred in . . . the requirement occurred on the 12th of December. He is talking about an entry after that time, and we would submit, for that reason, it doesn't have anything to do —

THE COURT: An entry after what date?

MR. NACHMAN: Your Honor, we propose to show that the inventories which show on the November 30, 1978 statement that I have just called to Mr. Parsons' attention, were written-down by some one hundred sixteen thousand dollars on the December 31, 1978 statement. And we have heard a great deal of testimony about value of inventories, and I wanted to ask what occurred to cause this write-down of a hundred and sixteen thousand dollars.

THE COURT: I will overrule the objection.

Q. (Mr. Nachman continues) You may answer, Mr. Parsons. What occurred to cause a write-down of a hundred and

sixteen thousand dollars of inventory between November 30, 1978, and December 31, 1978? [432] A. The normal course of business for a month's period of time would consume at least a hundred thousand dollars in inventory.

Q. You were selling that much a month? A. Yes, sir. I am sure it would have consumed that much.

Q. All right. Now, do you see an entry on this . . . Look at the item "machinery and equipment" on that Plaintiffs' Exhibit 9. Do you know whether that item "machinery and equipment" included some form rollers? A. You mean a roll former?

Q. A roll former? A. An essential piece of equipment.

Q. Yes, a roll former. A. Yes, sir. I would think so.

Q. And do you know whether that was put on the books as a capitalization of the salaries paid to the employees who worked on that roll former? A. I know that the piece of equipment was put on the books by the initial purchase price, the cost to restore back to its operational condition, which included the wages paid to the men who did the work, and all the tools and machine work done outside the plant. So, yes, sir.

[433] Q. Who are the employees who did the work? A. There were three employees in our maintenance department and I think all three of them worked on it for something over a thousand hours, or about a thousand hours.

Q. Did Mr. Burgess work on it? A. Yes, sir. I am sure that he was the main one.

Q. Did Mr. Mason work on it? A. Yes, sir. I am sure he did, too.

Q. Who else worked on it? A. There was a young helper, as I recall. I can't recall his name. But I think there was a third man.

Q. He was a young helper? A. He was a helper. Yes, sir. A maintenance worker helper.

Q. I may have asked you this and I apologize for the repetition, but is your testimony that your company did not discontinue any products line during 1977? A. No, sir. That is not my testimony.

Q. You did discontinue certain product lines during 1978? A. Yes, sir. That is right.

Q. What were they? A. Well, we discontinued the custom fabrication business **[434]** at some point in 1978, and late in 1978 we discontinued the manufacturing of certain agricultural items.

Q. And is your testimony that these changes had no effect on the values of inventories that you had in store for the lines that were subsequently discontinued? A. Yes, sir. That is true. It had no effect on it. These materials were bread-and-buter products you buy from U.S. Steel or Bethlehem Steel, and they could be used in a number of different items. They were not specialized to anything.

Q. I may be a little bit confused here. Do you mean by that that they could be sold outside of your business, or that they were equally useable within your business for the new and different business lines that you had gone into? A. Both.

MR. NACHMAN: Your Honor, may we have a conference with the Court?

THE COURT: Yes. It may be a good time to break, isn't it?

MR. NACHMAN: It could be. What I —

THE COURT: All right.

I am going to excuse the Jury until

* * *

Testimony of June Neely Williams

[486] A. Mr. Herbert, Mr. Norris and I and Mr. Parsons.

Q. All right. Did your Mr. Parsons submit any financial information to Mr. Herbert at that particular meeting, if you remember? A. Well, not a financial statement. No.

Q. Any type of information? A. Oh, we took some other things up there that the bank had requested. I don't know whether Mr. Herbert had requested them or Mr. Richardson. But it was in connection with the loans that we had, and they had asked for some information and we took some of that up there.

Q. Do you remember what that particular information was that you took with you? A. Well, I know we took. . .I am not sure, but I think we took the receivables and we took the appraisal that we had had made of the property, and we took . . . I think it was either titles or deeds or something like that to prove the ownership of the property, and probably the payables. I am not sure about that, either.

Q. All right, ma'am. Let me ask you some questions about that.

When you say you took the receivables, explain to me exactly what you mean by that? [487] A. A listing.

Q. Would the same be true of the payables? You are talking about a listing of the payables? A. Yes, sir.

Q. All right. Now, you referred to some deeds to real estate. What real estate would that be, Mrs. Williams? A. The property that the plant was located on.

Q. Do you know who owned that property? A. Parsons Steel in Montgomery owned the property.

Q. All right. Now, in this first meeting you had with Mr. Herbert and Mr. Parsons that you have just described for me, I

want you to tell the Court and Jury, if you will, what was said by Mr. Herbert in that meeting. A. Well, Mr. Herbert proceeded to make us very, very comfortable. And I think we had a cup of coffee and we talked about our loans, and Mr. Herbert said that he had some of the information that he needed to assess our situation, and he would need a financial statement. And he said that he saw no problems; he didn't see any reason why we couldn't work things out to get additional monies if we needed it, because that is what banks were for.

Q. Did he at any time in this meeting say that he or the bank was dissatisfied with the loans of Parsons Steel here in Montgomery?

* * *

[489] A. Yes, sir, I did.

Q. Now, after that information was delivered to Mr. Herbert, did you have an occasion to have a second meeting with him? A. Yes, we did.

Q. Do you remember about when that was? A. I believe the date was the 12th of December.

Q. About how long was it after you actually took him that statement down there? A. Well, it wasn't very long because I knew we were surprised that he had had time to review it and get back with us that soon.

Q. Okay. This second meeting or talk, where was it held? A. At the bank.

Q. Do you remember where in the bank? A. It was in a conference room.

Q. There near Mr. Herbert's office? A. Yes, sir.

Q. All right. Who was present in that meeting? A. Mr. Herbert, Mr. Parsons and I.

Q. All right. Mrs. Williams, if you will, tell the Court and Jury what was said by Mr. Herbert in this second meeting at the bank? A. Well, Mr. Herbert said that he was not pleased with **[490]** what he had; what information he had, and that he would not make any further loans to the company unless we employed. . .or, not employed. I guess it wouldn't be employed. Unless Mr. Orange came into the company and he was issued part of the stock of the company; a principal part, I believe he said, of the stock.

Q. You believe he used the term principal? A. I am not certain whether it was majority or prinicipal. I am not. . .I am sorry. It has been a long time ago and I can't quote it exactly.

Q. Was there any other discussion that day concerning the loans? A. Well, he indicated that if we went . . . if we did these two things, that the loans would be no problem; that we would be advanced any monies that we needed.

Q. What two things did he indicate if you did there would be further loans?

If that is not too confusing? A. That Mr. Orange be made chief executive officer of the company and that he be issued. . . or have an option, I think it was, on the stock in the company.

MR. WILSON: That is all we have, Your Honor.

Please answer Mr. Nachman's

* * *

[493] . . . Q. We have now identified that affidavit as Defendant's Exhibit 27. Let me call your attention to Page 3 of that, and ask you to read along with me, if you will, Mrs. Williams.

"Parsons Steel Industries did not need immediate loans in November or December of 1978 because of the availability of sufficient cash flow to operate on at that time. This was known to Mr. Jim Parsons, Mr. Herbert and to me."

Is that an accurate statement? A. That is just like it is printed here.

Q. And is that your sworn statement? A. Yes, sir, it is.

MR. NACHMAN: Thank you.

We would like to introduce this affidavit into evidence.

THE COURT: It is admitted.

MR. WILSON: No objection.

Q. (Mr. Nachman continues) Now, Mrs. Williams, did I understand you correctly that this is not correct, in fact, and that the company did need money at that time in December of. . .December 12, 1978, and that in fact it was behind in its payments to most of its trade creditors?

* * *

[498] A. I just told. . .answered that a minute ago.

Q. Yes, ma'am. But if you don't mind, just give me your best recollection of what exactly Mr. Herbert said about bringing Mr. Orange in, and that circumstance? A. Well, he said that no further monies would be available until Mr. Orange was brought into the company and made a principal, or a majority stockholder, or something to that effect.

Q. And that if he were? A. That if he were, additional monies would be made available.

Q. Was anything said about any specific amount of money that would be made available? A don't think so. I don't recall.

Q. At either one of those conferences, either the first one in November or the second on on December 12th, 1978, was anything said by you or Mr. Parsons about needing either two hundred and fifty thousand dollars or six hundred thousand dollars? A. I don't know.

Q. You don't remember any such statement? A. No, sir, I don't.

Q. Not at either one of those meetings? A. No.

* * *

Testimony of William Richardson

[549] reworking the debt, I asked Jim for a second mortgage on his home in Montgomery as part of the additional collateral, and which he refused to give, but worked out an alternative plan to pay a hundred thousand dollars on the debt which he would get from the Mobile corporation and pay it shortly thereafter. Which would alleviate us from putting a second mortgage on the reworking of the debt.

After that, I had several contacts with Mr. Parsons about possible sale of the company, and this type of thing. And then shortly —

Q. Excuse me. Go ahead. A. Shortly after I gave my resignation, I gave them notice I would leaving, Jim brought in a potential buyer that the bank reviewed.

Q. Would that have been Ajax Atlas, to your recollection? A. I believe that was the name of it; the Ajax Atlas Corporation.

Q. All right. What do you understand occurred with regard to the Ajax Atlas matter, as you may have any knowledge of it?

MR. WILSON: Your Honor, we object to that He was not at the bank at that time and would have no knowledge.

* * *

[560] as of approximately October 1, we will close a six hundred thousand dollar term loan secured by all equipment and all real estate, repayable over a five year period at ten thousand dollars per month plus interest. This will leave us approximately two hundred and fifty thousand dollars as a short-term line secured

by inventory and receivables, and an additional two hundred thousand dollars which is a one-time arrangement whereby we are financing some galvanized steel coil inventory for this company, and this loan will be paying out over the next few months."

Did you make that notation? A. I did.

Q. And the six hundred thousand dollar term loan, I believe your terminology, "we will close a six hundred thousand dollar term loan secured by the following . . . repayable over a five year period — A. I have already testified to —

Q. — at ten thousand dollars per month plus interest." Is that correct? A. Right.

Q. So, the plan of the bank, then, at that time, was to close a six hundred thousand dollar term loan, and that is why you asked Mr. Parsons, you say, for

* * *

Testimony of M. Orange

[781] A. He explained to me that the inventory had been overstated because he was making the statement with a view to getting the best possible price from a purchaser.

Q. Did he say who the purchaser was? A. Well, I was one of them.

Q. Who was the other? A. No. He just said purchaser. He didn't say.

Q. So, he admitted to you, if I understand your testimony correctly, that he purposely overstated the value of the assets of the company so that he could get a better figure from you as a prospective purchaser? A. Yes, sir.

Q. All right. So, he was not revealing the real . . . what his opinion was as to the real value of the assets? A. Yes, sir.

Q. How much less was his view of the real value of the inventory below what was shown on that November 30 balance sheet? A. He gave me a rough estimate of about three hundred fifty thousand.

Q. As compared to what? A. About a million . . . over a million.

Q. Now, the figures you are using "over a million" is that the November 30 financial statement, and if so, — [782] A. Yes, sir. He and I were both, —

Q. All right. Would you refer to the records so we won't be confused as to the exhibit number of the November balance sheet? A. I referred to the one million two-thirty on Exhibit 9.

Q. Plaintiffs' Exhibit 9. All right, sir. And the same reference . . . reference is to the same exhibit on accounts receivable. Is that right? A. Yes, sir.

Q. All right. Go ahead. A. And he indicated to me that, if anything, we would have to buy some material because some of it was not useable on the orders that we had, and there was no way that we could sell any of this inventory.

Q. All of the things you are saying now are matters that Mr. Parsons stated to you, is this correct? A. Yes, sir. This is my first thirty minutes at work.

Q. Now, to then get to the point you were just on, did he elaborate or explain in any way why a portion of these inventories were not useable in the business, in the manufacturing business? A. Yes.

Q. Parsons Manufacturing business? A. We . . . He didn't get into any great detail, but I [783] understood from his previous explanation that he had gone out of the agricultural business, and what he had left over was the remains or the surplus of that product line.

Q. This is what you testified to this morning; the one change in the summer of '78 and another change in October of '78? A. Yes, sir.

So, this is where it came into play.

Q. All right. A. And then, also, he had a great deal of heavy steel around very thick steel, for his fabrication. And that steel could not be used in the buildings which was now his only product line because he wasn't making I-beams. That heavy steel could have only been used for I-beams.

Q. And C-beams? A. Not C-beams. But he was using C-beams. So, again, the steel was surplus.

Q. What else did you . . . Is that . . . A. No. Then I was pretty crushed because —

Q. Well, before we get into your state of mind, is there anything more wrong with the inventory that you discovered on

this first day of business? A. No. That is about the gist of it.

* * *

[806] Q. Before . . . Let me interrupt you a second.

Was that the first time that plan had been proposed to you? A. The very first.

Q. Did Herbert or anybody connected with the bank ever propose that plan? A. No, sir.

Q. Parsons proposed it for the first time — A. Mr. Parsons —

Q. — insofar as you were aware of the plan? A. Yes, sir.

Q. All right, sir. Go ahead. A. And he explained that the bank was in a dilemma if they should foreclose, because the Mobile corporation owned the land, yet the equipment and all the other assets that they were foreclosing on were on that land. And that was a real problem for the bank. And I . . . His exact words were, "The bank wants this real estate so bad they can taste it." And he said, "Therefore, this is a good plan." He said, "I will be relieved of all personal liability. I will be relieved of my guaranty, and the bank can have this land."

Q. You say those were his exact words? A. The bank wants it so badly they can taste it.

[807] Q. Did you write that down, or do you just recall it? A. No, sir. I didn't write it down.

Q. All right. A. But . . .

Q. So, what else did he propose; Mr. Parsons? A. And then he went through the details of the plan whereby I could become the sole owner of Parsons Steel Industries because the bank had confidence in me, and now that they had . . . that I was the missing ingredient for a plan like this. If he had had somebody like me before, it might have been done before. But now that we had the missing ingredient, he could go ahead with this plan.

Q. What was the missing ingredient? A. Somebody the bank would have confidence in.

Q. Had you ever, prior to this time, had any conversations with Herbert or anybody else with First Alabama Bank about this plan? A. No, sir.

Q. Or any such similar plan? A. No, sir. No plan.

Q. So, what did Parsons propose to do? A. He proposed that the bank foreclose and that then he would sell directly to me the real estate in question and then I would buy the remaining assets from the **[808]** bank.

Q. Where were you — A. And that was the plan.

Q. And where were you to get this money? A. He stated that the bank would be prepared to advance the funds . . . no. Excuse me. He didn't say that. I . . . He stated that he was confident that he could carry off a plan like this. He had not discussed it with the bank, either, he said.

Q. He told you that? A. Yes, sir.

Q. And was . . . Did he say anything at that time about any obligation to a man named Hodge for a hundred and seventy-six thousand dollars arising out of the purchase of the stock in this company a few years before? A. I don't remember that.

Q. That doesn't — A. I don't remember that.

Q. You don't remember that coming up in this conversation? A. Right. He was only saying that he would be relieved of all personal liability to the bank. That would accomplish his objective. The bank would get the real estate and that would accomplish their objective. I would get a company. Everybody ought to be happy.

Q. That is what he said?

* * *

[810] Q. And when did you see him next or talk to him next about this plan? A. At eleven o'clock, roughly eleven o'clock in the morning he came back and he was walking on air.

Q. This is still on the 5th of January? A. Still that morning, eleven o'clock. He was jubilant, happy, excited. He said, "The bank bought it. I told you I could do it." He said, "We are proceeding with this plan. If the creditors don't come in by January 15th we are in business."

Q. All right. A. And then . . . I could hardly believe it, but then Mr. Parsons left . . . Yes, sir?

Q. Did you verify this with Ed Herbert? A. No, sir. Not for many days.

Q. When did you talk to Herbert about it? A. I either talked to Herbert Tuesday, January 9th, or Wednesday, January 10th.

Q. Did you and Parsons have any discussion about bringing Sam Kaufman into this matter at this time since he had represented the company in composing and sending out the letter of December 21st? A. Mr. Parsons and I were both very angry at Mr. Kaufman for not allowing us to choose which plan suited us. He was dictating to us that he wanted Chapter 11. So —

[811] Q. Instead of what? A. Instead of what he had called the quick method. And he never elaborated what that quick method was.

So, we were angry at Mr. Kaufman and we decided that — and I consulted counsel later — that since nothing was going to happen until Monday, January 15, we would delay answering Mr. Kaufman until Monday, January 15th.

Q. And you and Mr. Parsons jointly decided that? A. Yes, sir.

Q. Now, the counsel you consulted — A. Was Henry Hardegree.

Q. Another lawyer in Montgomery? A. Yes, sir.

Q. He didn't represent First Alabama Bank? A. No, sir.

Q. All right. So then you went back . . . or went to Herbert on the 10th, you say, the 9th or 10th? A. 9th or 10th. And that was the first time that I learned that, believe it or not, the bank said yes.

Q. And what arrangement did you make with the bank? A. And then we discussed a plan. And part of the plan was that I would have a corporation organized and this corporation, this new corporation, was prepared to buy these assets.

[812] Q. Was the new corporation first called Standard Steel Services, or something? A. Standard Steel Building Systems, Inc.

Q. And was that name changed to O.S.I.? A. Yes, sir.

Q. So that the corporation that is now O.S.I. began as Standard Steel Building Systems, Inc.? A. Yes, sir.

Q. And simply changed its name? A. Correct.

Q. Go ahead. What other parts of the arrangement did you make with the bank? A. Well, beginning with January 5th —

Q. Well — A. — with the bank?

Q. Yes, sir. You are at January 10th? A. January 10th; the morning —

Q. You and Herbert are working out arrangements. You are going to set up this corporation. A. Yes, sir.

Q. And what else is going to happen? A. This corporation would then borrow money . . . I would organize the corporation and pay for that. Then the corporation would . . . I also agreed to use my own money to buy the real estate. And —

[813] Q. By your own money, you mean money other than money advanced by the bank? A. Yes. I would not take an advance from the bank. I was going to use my own funds for the real estate.

Q. How much? A. Three hundred seventy-six thousand.

Q. So, you put up three hundred seventy-six thousand dollars of your own money? A. No. I agreed, I agreed, in speaking to Mr. Herbert, that I would put up —

Q. I see. A. And then the balance would be advanced to enable this company to buy the remaining assets of . . . that were foreclosed upon.

Q. And was there any changes made in that plan? A. Well, this was a skeleton of a plan. This is not a final . . . but in outline we reached an agreement; in outline.

Now, at this meeting I had my attorney present —

Q. This is Mr. Hardegree? A. Mr. Hardgree. And he was working out the details and discussing —

Q. Did Mr. Herbert have any attorney? A. I beg your pardon.

Q. Did Ed Herbert have any attorney present? **[814]** A. No, sir.

Q. Go ahead. A. It was my attorney and I. And we went through this outline of what was required to carry out the plan.

Q. And what ultimately turned out to be the plan? A. That . . . subsequently the bank said, "It won't be necessary. We are agreeable to lending you the money for the land, also." It will be just more expedient, I guess. And they advanced the money and I bought the assets.

Q. How much, all told, was the loan for; the loan to your company? A. Roughly, one point two or one point three million.

Q. And part of that, of course, was a loan already outstanding with the bank? A. It represented the principal outstanding plus all accrued interest. All interest accrued and not paid.

Q. And how much new money? Three hundred and seventy-six thousand? A. I beg your pardon?

Q. How much new money? Three hundred and seventy-six thousand? Is that how much new money the bank advanced or was it less than that? A. It came out to less than that. I think the new money advanced may have been in the area of three hundred **[815]** thousand, maybe.

Q. Could it have been as low as a hundred and seventy-six thousand? A. There was a hundred and seventy-six plus two hundred.

Q. The two hundred, am I correct, was to pay off the existing mortgage on the property? A. yes, sir.

Q. And the hundred seventy-six thousand was to go to Hodge? A. Yes, sir.

Q. And that would relieve — A. That would relieve Mr. Parsons of his personal liability there, also.

Q. He had a personal liability with Hodge for the hundred and seventy-six thousand? A. Yes . . . Yes. So, in one fell swoop he would get out his personal liability to the bank and he would get out of his personal liability to Mr. Hodge on the money he owed him.

Q. And the Mobile company would get out of its obligation — A. And the Mobile company would have the realty free and clear, to sell.

Q. Do you have any notations in your diary there or any precise recollection as to the date on which the Mobile company deeded this property? **[816]** A. Yes. According to my books, on Thursday, January 11 at eleven A.M., Mr. Parsons and I

went to Mr. Hardegree's office and for the . . . to consummate the purchase of this realty.

Q. That was purchased on January 11th? A. Yes, sir.

Q. Did Parsons sign the deed? A. Yes, sir.

Q. On behalf of the Mobile company? A. He came to that meeting with his wife, and whatever the lawyers gave them that was necessary, I guess they signed.

Q. Mike, was it necessary for somebody to go from Montgomery to Mobile to get certain papers executed or bring certain papers from Mobile to Montgomery in the process of this closing? A. Yes, sir.

Q. Who did that? A. Mr. Parsons went to Mobile, I think right after that Thursday, because he was not in Montgomery on Friday, January 12th.

Q. What — A. Or he left that morning to go to Mobile.

Q. Well, do you know whether he went to Mobile? A. (No response.)

[817] Q. Let me make the question clear. Do you know whether Mr. Parsons had any role in getting papers back and forth between Montgomery and Mobile in connection with this transaction you have described? A. Yes. He said he was personally going . . . He had to go. Yes. He was going and he was going to bring them back.

Q. All right. Did he? A. Yes, sir.

Q. Now, you were present, I assume, when the assets that the bank had subject to the security agreement and had taken possession of, when they were sold were sold by private sale to your company. Is that correct? A. Yes, sir.

Q. Was Parsons there? A. No. No, sir. He was not there.

Q. Was he made aware of the closing out of all these matters? By all these matters, I am talking about the bank sale of the assets? A. Oh, he knew about it, but he wasn't there on January 17th.

Q. But he was advised when everything was done? Was he or wasn't he? A. No. He was advised that it was going to be done.

Q. Well . . . Did he ever become aware that it had been done? **[818]** A. Not that I know of.

Q. Did he ever express to you any feeling with regard to the accomplishment of this matter; any feeling of his own? A. Yes; he was overjoyed when the foreclosure took place.

Q. Well, that . . . Did he express that to you? A. He wanted me and the two girls that worked in the office, he invited us to go have a drink with him to celebrate that.

Q. The accomplishment of these matters? A. Yes, sir.

Q. This was after they had all taken place? A. This was on January 15th, after the foreclosure. It was about two thirty, three o'clock in the afternoon, and he wanted to go celebrate with me and the two office people then that remained.

Q. He did, then, express pleasure that this transaction had — A. He had his arm around my shoulder when we walked down the stairs.

Q. Well, regardless of where his arm was, did he express satisfaction? A. He was very pleased; he was relieved of liability on all counts, and he was a free man.

Q. Now, I want to be very clear now. This whole plan, as **[819]** I understand your testimony, was Parsons' idea that he sold to the bank? A. Yes, sir.

Q. It was not the bank's plan? A. No, sir.

MR. NACHMAN: You may cross-examine.

Cross-Examination

By Mr. Beasley

Q. Let me make sure I understand that last summary by Mr. Nachman.

You are telling this Jury that — A. Yes, sir.

Q. — that a bank in this city loaned you . . . or not you, but a corporation that you had just formed, one point three million dollars and required nothing more than the brief conversation that you have described to this Court. Is that correct? A. We were implementing a plan.

Q. No, sir. That is not my question. The question is: Did a bank in this city, specifically Mr. Ed Herbert's bank the First Alabama Bank, loan a corporation that you had formed one point three million dollars with no more conversations with you than what you have testified here today? Is that correct?

MR. NACHMAN: Could we request that counsel

* * *

[897] Q. Do you recall Mr. Orange's testimony that this plan that was called a contingency plan was first proposed to you by Mr. Parsons? A. Mr. Parsons came in my office on the 7th or 8th of January —

Q. Of '79? A. Of '79, and told me, in essence, that he was assured that the composition plan that had been sent out for the creditors to accept was not going to be accepted, and he didn't want to go into Chapter 11 bankruptcy.

And his words to me was that very few people ever survive and come out of a bankruptcy proceeding, and he would be dead in the steel industry if he did it. Meaning he would lose everything he had, the way I took it. And he had a plan. He

knew that if I went ahead and foreclosed — and we had discussed that — I would end up with the machinery and equipment and inventory, and this sort of thing, but his Mobile corporation would own the lands and building, and I would be faced with piece-mealing this, whatever inventory goods I had, out on a distressed market. And I have been through this before and you are lucky to get twenty-five cents on the dollar when you put it out for grabs.

Q. Let me ask you this, Ed, before you get into that.

[898] That was Parsons' plan. Is that right? A. That is right.

Q. Had you ever proposed it before to Parsons? A. Absolutely not. It was his idea that he came in and proposed somewhere around the 7th or 8th of January, when he learned that the composition of creditors was not going to work. He knew that, as a going business, you have a chance to survive and I knew that it had a chance to survive. And my big concern was that his Mobile corporation owned the lands and building and if they paid off this two hundred thousand dollar mortgage on there, then he could simply tell me, "Get your stuff out of my building," which I would have to do and I would have to virtually give it away to get rid of it.

Then my alternative was to come back against him for any shortages and sue him for the five hundred thousand dollar guaranty.

Now, that is a rough way to try to settle a long-standing relationship that gets in trouble. I would prefer to work it out some other way and he knew I would.

So, I had to weigh the proposition of putting up another hundred and seventy-six thousand dollars that he said he owed Mr. Hodge for the stock, and his **[899]** words to me is, "If I can get this much money, I can pay Mr. Hodge off for the stock and then I will own it all and I can do with that real estate what I want to do, and I would be willing to sell it. And that way you

will have a going business, the lands, buildings, machinery, and equipment and everything, and it won't have to go out of business and be piece-mealed or go through bankruptcy." Well —

Q. So, this is why you agreed to go along with it? A. That is right. This would then put it in a manageable, cohesive unit that could be dealt with. You could do something with it. Your chances of getting your money back in a situation like this are much better if a business can continue to operate rather than just close it down and destroy it. That is what prompted me to be receptive to his plan.

Q. Now, let me show you Defendant's Exhibits 28 and 29. One is a letter of January 8th, 1979 which I read to the Jury this morning, and the other is Defendant's Exhibit 29 which I also read to the Jury this morning. A. Yes, sir.

Q. The first . . . Did you send the letter of January 8th out after you had this conversation with Jim Parsons which you just described? **[900]** A. It was a direct result of our conference.

Q. In other words, that the notes are now due and you are calling them? A. Subject to all of the creditors' accepting the plan, and they had until one o'clock on January 15th to accept it. I called the loan subject to that.

Q. And then 29 you sent out on January the 15th?

Do you have that there? A. On January the 15th?

Q. Yes, sir. Defendant's Exhibit 29. A. Yes, sir, I have that.

Q. Now, the letter, which, as I say, I read this morning, gave five days' notice that the bank was going to sell the collateral which was securing the loan. And then at the bottom, there is an acknowlegement of that, and under the company's signature by Parsons as its president, it says, "I see nothing to be gained by any delay and waive the five days' notice and consent that you take whatever action is necessary?" A. That is right.

Q. Did he also consent to a private sale? A. Yes, he did.

Q. Did he know what he was doing when he signed this? A. Obviously he did.

Q. Had you discussed this with him? **[901]** A. In detail.

Q. And what did he say? A. He was all for it; very enthusiastic that we would go along with this and get him off of his personal liability.

Q. Which was how much? A. Well, it was about a million one to the bank. He owed us about a million one and he owed Hodge another hundred and seventy-six thousand dollars.

Q. Now, you stated earlier that his personal guarantee was for five hundred thousand. Actually, he had a personal guarantee on all three of these notes, didn't he? A. Yes, he did.

Q. And his wife had one on the five hundred thousand dollar note? A. That is right.

Q. Up to two hundred thousand? A. And pledged the real estate.

Q. Up to two hundred thousand? A. That is right.

Q. All of those would have been subject to liability, would they not? A. Oh, yes.

[902] Q. And then the one hundred seventy-six thousand was for what? A. That was to pay Mr. Hodge for his remaining stock. We couldn't have done that unless Mr. Parsons was fully in accord with it. Anywhere along the line he could have stopped. He didn't have to do it.

Q. Now, on January 12th. I believe you presented this plan to the directors. Is that correct? A. That is correct.

Q. Of 1979; the plan that you have just outlined? A. That is right.

Testimony of Edward Herbert

[903] August 31, 1979; July 31, 1980.

Q. And those are the dates the bank examiners came? A. That is correct.

Q. June of '78 and August of '79? A. That is correct.

Q. Did they come at any time between June of '78 and August of '79? A. No.

Q. Let me ask you this, Mr. Herbert. Did First Alabama Bank, through you or anybody else, ever require that Parsons or Parsons Steel of Montgomery or Melba Parsons, or the Mobile company, or anybody else make Michael Orange chief executive officer and president of Parsons Steel of Montgomery? A. No one from the First Alabama Bank ever made such a demand.

Q. Or requirement? A. No.

Q. Did First Alabama Bank ever make a requirement that Orange become a major stockholder of Parsons Montgomery? A. First Alabama Bank put no restrictions of any kind whatsoever. I simply —

Q. Did it ever make that requirement? A. I simply put the two of them together to work it out.

Q. Was this their plan; the director's plan? A. No. This was the plan that Mr. Parsons had proposed to me and I presented to the Board of Directors and recommended that we do it.

Q. I assume for the reasons you have just described? A. Yes. Well, it would simply be transferring the same amount of debts over to another and putting out a hundred and seventy-six thousand dollars to pay off Mr. Hodge, which would give free title to the land.

Q. Did you, at my request, make an effort to ascertain whether . . . or, what the dates were that the bank examiners came to First Alabama Bank during the years '77, '78 and '79? A. Let me read you this: March 29, 1976, June 30, 1978;

* * *

Portion of Plaintiff's Closing Argument

[954] . . . THE COURT: I have not excluded his testimony.

I let it in for what it is worth.

(Whereupon, Court was in recess for approximately fifteen minutes, after which the following occurred in the presence of the Jury and all parties:)

THE COURT: All right. Gentlemen, forty minutes to the side.

MR. BEASLEY: May it please the Court, and Ladies and Gentlemen of the Jury. I would like to first just thank you for your attention in this case. I have just sort of observed that every one of you have paid attention to about every single thing that happened, and I know it all happened mighty quickly. We anticipated a much longer trial than we had. The testimony went much quicker, and even the fights between the lawyers were possibly less in this case than in most cases, which I know you all appreciate. I have always felt like that when lawyers get

to fighting and fussing and the Judge has to call us down — and it always happens and we do, just by training and nature, sometimes get overly involved and, perhaps, do it to the damage of our clients. I don't think much of that happened in **[955]** this case. But, if it did, let me ask you not to hold what I might have done or what Frank might have done against our clients because we were representing them to the best of our ability, as Mr. Nachman did his client.

When you were selected to try this case, you were selected and took an oath to render a verdict based on the evidence. Now, what I say and what my interpretation of the evidence is is not binding on you at all. I have my opinions of what happened in this case, what happened back in '77, '78 and early '79. I believe that from the evidence that, collectively, a Jury can determine what did happen in this case; what happened to cause the final results.

Now, the facts came pretty fast, but when you think about what happened to the Parsons, it happened mighty fast. Let's go back and first see why we are here.

Mr. Nachman said anybody can file a suit; said anybody can just file a suit. Let me tell you, if this were a frivolous lawsuit, it wouldn't be before you right now. And let me ask you, also, to think back to the opening statements of both lawyers. Both lawyers.

Mr. Nachman's primary defense was that what **[956]** the bank did was a usual, customary, accepted bank practice. Now, during the trial, they also threw in some other things. First of all, they just flatly denied there was anything wrong, which we expected. We expected them to do that. But their real defense was that. And you recall his opening statement to you he said, "It was just an ordinary, garden-type of act by the bank." The act by the bank he was talking about was this: The bank required of a man who had worked in that business after he

bought it and had run it, required of him that he give up that business to a stranger, a man that he didn't even know. Give up ownership of it and give up the running of it by allowing this gentleman to become president and chief executive officer of the corporation.

Now, let me ask you first of all, does it make sense that a businessman would give up what he had worked for and what he had earned for one hundred dollars? Does that make sense? A lot of things in this case really hadn't made sense, but when you go back and look at the testimony and analyze it, people like Sam Kaufman, Luther Waller, even June Neely, had no reason to come to court and lie. She had worked for them and she now lives over in Mississippi and came and testified. Ed Hodge had no interest in the **[957]** outcome of this lawsuit; none whatsoever. And he came in here, and do you remember what he said? He said he went out there in October and November and December. He said it was — and I think I am going to quote him accurately — said it was an excellent manufacturing plant. He said the only thing he saw they had too much inventory. And do you recall, I asked him the question, I said, "Mr. Hodge, could that inventory have been sold?" He said, "Without question." I said, "Was it good and useable?" And he said, "Without question." He knew the operation of this plant. Why? Because he had owned it. And he said he had been back out there almost monthly from the day he sold it to Parsons, and he said in December, the critical month, that the inventory was there, it was useable, and it was inventory that could have been sold.

And the reason I asked these questions about the coils, when this case first came to my office and they were talking about coils, I related coils to automobiles. That is the only experience I had had in this field. I asked him what a coil realy was, and I looked at coils, and I found out that a coil could weigh as much as twenty thousand pounds. It could weigh that much. Can you imagine twenty thousand pounds of steel that would be us-

ed **[958]** to manufacture a number of items, not just one item as the defense would lead you to believe, but a number of items.

Do you remember what Mr. Hodge said that steel was worth? There was testimony, undisputed, thirty-three cents a pound. And do you recall how many coils they said was on the premises? He said too much. He said he had more inventory than what they could use.

Now, I asked him specifically — and remember what he said when I asked this question? I said, "Mr. Hodge, did you see any scrap as you toured the plant and looked over the facilities?" Do you remember what he said? "Very little. Very little, scrap. All of it was useable, good material."

This is why my good friend, Lannie Crane, who is an excellent accountant and was hired to do a job and he was hired to reach a result given certain information. And do you remember what he said when Mr. Wilson was cross-examining him, very nicely and very easily? He asked him this question: He said something to the effect, "Were most of the assumptions if not all of the assumptions that you made favorable to the bank?" He said, "Yes." "Where did you get the information?" "From Mr. Nachman or Mr. Orange and **[959]** folks on the other side." Nothing from Mr. Parsons. Nothing from anybody who worked for Mr. Parsons, except one secretary who is still out there who he said could give nothing significant. And he admits he didn't know what a coil was and he admits he never had really seen any of the things he was talking about. He didn't, for example, realize that you estimate work-in-process in many businesses, and that work-in-process is estimated; what could be, say a hundred and twenty thousand, in actuality could have been as much as five hundred thousand. No way for Lannie to know this.

But what I am saying is, Mr. Hodge did know. He had been there. He had seen it. He had owned, in fact, the business at one time; the plant. Can you imagine a plant sitting on twenty

acres of land? Three massive buildings? Do you remember what he said about the bay? He compared it to this courtroom. He said one of the bays would be the size of this courtroom. Now, there were many bays in that plant, you see. All of them functional, all of them operative, working with good inventory, good equipment. And if a man who had no interest came in this court and stated under oath that that was an excellent manufacturing facility, I would have to believe **[960]** him. They didn't try to cross-examine him, did you notice, on that point. Very, very light.

Now, obviously the witness who testified who are directly involved, obviously have an interest in the outcome. That would include Mr. and Mrs. Parsons, it would include Mr. Herbert; it would include Mr. Herbert; it would include Mr. Gaskell, it would include Mr. Orange, it would include a number of people who testified for the defense. But I have never seen so many inconsistencies between their own witnesses.

For example, Mr. Waller said — and I think he tried to tell it as straight as he could. He said he saw...felt sure he saw Mr. Herbert over there in a private meeting. He also said he recommended his law partner, Sam Kaufman, which certainly makes sense; if there is a fee to be made, he is going to recommend his partner. And that was back in early...on the 14th of December.

Mr. Orange said Mr. Herbert recommended Mr. Kaufman. Obviously, Mr. Kaufman was already involved. But Mr. Waller and Mr. Kaufman had no reason to come in here and tell anything but the truth.

Do you remember when we were talking about the 8th day — and I wrote it down and circled it for a reason. I said, "When did Michael Orange lose **[961]** interest in the plan you were trying to foster" — the lawyer — "and start on his plan and Mr. Herbert's plan?" And that plan was to turn over the business to a stranger who Jim Parsons didn't even know. I said...I asked

him several times — the Judge had to fuss at me about it a little bit, but I do that sometimes. I just want to make sure the Jury hears the important points in a trial — I said, "Did Mr. Orange, from that point on until the end of it, talk to you and ask questions about how this would work and how that would work; how he could buy it or anybody else could buy it; how this would work, the legal ramifications?" And do you remember what Mr. Kaufman said? He said, "Yes. Many times. Many times." I asked the same question of Mr. Orange: "No knowledge of it. Couldn't remember it." I asked him this. I said, "Why didn't you use Mr. Kaufman when you got ready to buy this business? Why didn't you use Mr. Waller instead of going out and forming this new corporation and doing it with secretaries and lawyers, not even using your own name, and not even using the initials that finally went into it? Why didn't you do that?" He never did give a very good answer to that, in my opinion.

Now think back for just a minute. This **[962]** bank loaned a person who formed a corporation — a shield-type corporation to keep the individual from having any liability, you see — formed a corporation, loaned that corporation without any assets at that time one point three million dollars. That is a lot of money. A lot of money.

Now, you can bring your own experience into this jury box. You do not have to shut out your experience when you come in to make a decision on a case. Let me ask you this: Would a bank loan anybody who formed a new corporation, unless he was a multi-millionaire many times over, one point three million dollars unless he got some of that multi-millionaire's collateral or some other assets to back up that loan? I don't believe he would. I don't believe Mr. Ed Herbert would do that because he has been in the banking business a long time, a long time. One point three million, Mr. Orange put up one thousand dollars. He got the land, he got all of the assets, all of the coils Mr. Hodge told you about, and Mr. Parsons, all of the equip-

ment; everything out there. They shut out, effectively, the unsecured creditors. That is out, at this point. But they get a valuable piece of property, they get a good business, they get the Parsons' business. And they **[963]** are going to tell you that Mr. Parsons benefited from this arrangement. They are going to try to tell you that Mr. Parsons actually dreamed this scheme up.

I want you, when you go back into the jury room to deliberate to look and see if you can find anywhere in these records that have been put into evidence in this case where the bank has any records anywhere bad about Jim Parsons, Melba Parsons, or Parsons Steel, Inc., but specifically, anything bad about the company here in Montgomery. You won't find anything. The first thing you will find is Exhibit 59, I believe, where the Directors meet, and that exhibit will say, basically, that...well, I won't try to state it. I will read it to you.

I will say, exactly, the first report to that board...and remember this. Mr. Herbert wrote the manual. I want you to read, if you will — now, I hate to ask you to do this because it is fairly thick — but find the sections in here that define the responsibilities of the loan officer, find Mr. Herbert's responsibility in this book, find the directors loan committee's responsibility in this book, and see exactly what it says they are supposed to do. And then after you do that, you take the documents **[964]** that show the transactions...and you recall what Dr. Dense who testified who we hired as an expert — and we certainly don't apologize for that. Each side has a right to bring in experts and put them on the stand, especially in critical points. And the critical point in this case is — was there a violation of the bank holding company act. The critical issue is was what the bank did — which they now deny, or which they spent most of their time trying to justify, if you remember — was that a usual, in other words a customary, accepted, appropriate banking practice; as Mr. Nachman says, a garden variety type act by the bank?

I want you to go back and look at the records and find anywhere in here, up until the bank did this to the Parsons, where they say anything but good about the Parsons, about this business. And then take...Mr. Hines made this report, and I guarantee you that Mr. Hines hated to testify in this case. He didn't want to be on that stand. I don't blame him. Because he did exactly what anybody would have done; he made the review and he said he talked to the loan officer, Mr. Richardson, and he said...He answered all my questions just as honestly as he could. He said, "Yes, he did this. He made the **[965]** review."

Now, obviously if the loan had been in trouble they wouldn't have turned it over to a junior person in the bank that has got a responsible position, but they would have given it to somebody, I believe, that would have really torn this thing apart if the loan had been in trouble in August of 1978 like Mr. Richardson would not like you to believe.

Everything just ties together, Ladies and Gentlemen. Look at the records; at what they put on the stand. Think back on the testimony. They violated this Act. It is not a criminal trial, though. There is no criminal act on the part of the bank, in my opinion. I believe they violated the civil law, without question. I think they have damaged the Parsons, without question, they have hurt them.

But the issue in this case is, did they violate the Bank Holding Company Act? Now, I want you to just look at these records. Look at them carefully because that is really what the lawsuit is all about.

Dr. Dense, as I was going to tell you, made the statement on that stand that he acutally helped write the manual for the examiners who examine these national banks. He has actually been involved **[966]** in that activity. He actually has great knowledge of the banking industry. They didn't try to destroy Dr. Dense's credibility. In fact, they didn't question anything about it. This man knows his business. He is an expert. He said

he has testified on both sides; he has testified for banks and he has testified for plaintiffs, and he tells it exactly like it is. He didn't try to dodge any questions. The Judge had to fuss at him one time about fencing with Mr. Nachman and, frankly, I wish he hadn't. But the whole truth of the matter is, he said if there was anything wrong with that loan you would find it in the bank records. Do you remember that question asked him? He said it would be in the bank's records if the Parsons had done anything wrong. So, that tells me they didn't consider this much of a problem loan, really. It was well collateralized. Look at what the records said.

Go back to...Mr. Herbert himself passed on that loan back in '77 for a half a million dollars; five hundred thousand dollars. They made Mr. Parsons put up everything you can imagine. Made his wife sign a personal guaranty — of course, she did on the stock — they got a guarantee out of it, also they got one out of Mr. Parsons, also they got the land...**[967]** or a mortgage, which Mr. Herbert skillfully didn't tell you much about during the direct testimony.

You remember what he said? Exactly what he said? I wrote it down. And I hope Mr. Nachman disputes me on this one point because he is going to dispute me on a lot of points. I want him to dispute me on this fact: Mr. Herbert, as I recall his testimony, said, the reason that we had to take hold of this plan of Jim Parsons — where he wanted to give his business away — the reason we accepted it so quickly and didn't even talk to Mr. Orange much — just sort of like he was a stranger to us; we have never heard of this man Orange — and you remember all this. Mr. Herbert said, "The reason we had to do it was because Jim Parsons could throw us off the land if we were to go in there and take this plant."

Now, let me tell you the exact truth on that. On cross-examination he said, "Yes. We did have a mortgage. Yes. We did." I said, "Could you have foreclosed that mortgage just

like you did the personal property?" He kind of ducked his head.

Did you notice on direct examination he was eager to answer questions? Made a magnificent witness. In fact, sometimes he even answered the questions before the lawyer really asked them. In fact, do you **[968]** remember when we were talking about the business of the private meetings? He refused on that because he knew the answer to the question was something else. And he said "I made one mistake." Said, "Yes, I thought I was in that meeting but I really wasn't, even though Mr. Waller saw me and Mr. Kaufman saw me." And Mr. Orange, I believe, also saw him — I am not sure what he testified on that.

But now he is trying to say that "we just had no choice but to take this land...or this property, this plant. Because he still had the land." But he admitted on cross-examination, "Yes. We could have foreclosed"; reluctantly he admitted it. But he said, "They didn't owe us but two hundred thousand dollars. We couldn't get but that part of it." I think that is incorrect and I think the Court will so state that they have a right to foreclose the mortgage, and the only rights that the landowner has is to redeem it at any time later within a certain period of time in this state, if he can get up two hundred thousand dollars plus the cost and everything that the bank has spent as a result of this. That is the law of the state, and if not I will be corrected.

Now, let me ask you this: If Jim Parsons in that little short time could have come up with two **[969]** hundred thousand dollars, that quick from the corporation, why didn't he just pay the notes up to date? They were without question in default. Look at them closely to see when they were in default. You notice they didn't say much about that.

Now, it all just ties right together when you think about it; when you analyze it. And I believe that any argument that Jim Parsons gained out of this is going to be mighty hard to sustain

because, obviously, without question, this was a good business. Everybody has cash flow problems, anybody in the business has it.

I will have the opportunity to respond very briefly to Mr. Nachman's argument to you. I appreciate your attention, and I will reserve the rest of my time for then. Thank you.

Portion of Defendant's Closing Argument

THE COURT: Mr. Nachman?

MR. NACHMAN: May it please the Court, and Ladies and Gentlemen of the Jury. I want to join Jere Beasley in thanking you for your attention here in very difficult circumstances. I know that most of you had to come a long way for a four-day trial, and we appreciate it because you people and the Judge here are the only people that we have to resolve the disputes when they arise between persons or persons and **[970]** and businesses, or however. That is what the American system of justice is about. But I know it is an inconvenience and it has been hard. I am glad we are concluding this case today and I certainly agree with Jere: I am glad it didn't last as long as we predicted it to last.

Now, let's talk about this case. Let's not talk about whether somebody was in an office at a certain time or whether somebody said something, or whether somebody wrote something down. Let's just talk about what this case. And I will return to my earlier statement. This is a garden variety case. It is an unusual case because it comes under a very, very narrowly drawn Federal statute which, as I told you at the outset in my opening argument, prohibits banks from doing certain things of an anti-trust nature; anti-competitive; against free competition. And what it prohibits banks from doing is to say to any customer, we will only . . . let us say . . . I used the example in my opening argument, of an automobile dealer. "We will only

lend you so much money, Mr. Automobile Dealer, if you, Mr. Automobile Dealer, will agree to discount all your notes to our bank." Or, "We will only lend you money to purchase a piece of real estate if you will agree to go through a certain real estate agent."

[971] It is that kind of tying one thing to another that this statute prohibits. This statute hasn't got one thing in the world to do with whether anybody connected with First Alabama Bank or any other bank followed a loan manual or didn't follow a loan manual, or whether anybody connected with the bank wrote something down or didn't write something down — Congress hasn't said that somebody can come into court and sue a bank for that.

There is no such thing as that involved in this case. It is all camouflage. It is all covering up what the facts in this case were which show, first of all, that there never was any loan; that the bank . . . we don't even get past that point, because we think the testimony is overwhelming. It was denied by Jim Parsons, and that is all, and I will get to him later.

But Mr. Ed Herbert was absolutely plain: The last thing the bank did with regard to these loans was to wrap them up in September and consolidate them. And from that point on, it was just a question of when the bank was going to foreclose because the loans, without dispute, there is no dispute in the evidence, the loans were in default and the bank

* * *

[980] events that took place in December. Now, bear in mind the bank could have foreclosed these loans at any time. Bear in mind that the bank was willing to go along with this composition of creditors to defer the time to pay the principal, put it off until some future time; to lower the interest rate to some future time; indeed, to give them five or six or seven months without paying any interest at all. The creditors wouldn't go along with

that. Then we come to the matter of whether the bank had anything to do with forcing Mr. Orange, Mike Orange, into this business.

Now, first of all — to return to the point that I mentioned earlier — unless you find that the bank had committed, had agreed, to make a loan, you don't even need to reach the question of whether the bank insisted on any condition for loaning because the first thing you have got to find is that the bank agreed to make any loan. And we submit that the evidence is overwhelming. You have heard Herbert's testimony. You heard Orange's testimony that there was no agreement whatever to loan them any more money. And use your own good common sense. Would you lend this man any more money? You know perfectly well you wouldn't have lent this business any more money. The **[981]** last thing in the world the bank would have agreed to would have been to lend him any more money. So, that is the end of that part of it.

But, let's suppose, just for the sake of argument, that there had been; you go past that point. Would it have been unreasonable, would it have been improper, for the bank or anybody else, you lending money to a business, to insist, when the business was being run that way and you knew it was, that you wouldn't lend any more money unless there was new management?

Now, Herbert has said as plain as anybody can state: All the the world he did was introduce these people and put them together with one another, and from that point on they worked out their own arrangement. The first thing they did after they determined that Orange didn't want to buy the business was to get together on some sort of stock option agrement. Here again, without dispute, Jim Parsons told Luther Waller that he owned ninety-eight shares out of a hundred shares of this Mobile corporation. It is in the very first paragraph of that option agreement, and Jim Parsons signed it three different times. Same false statement, without dispute...

Portion of Plaintiffs' Final Closing Argument

[991] city, what did he say about the garden variety case? He said in forty-six years he had never heard of a bank requiring a change in management and a change in ownership as a condition to making a loan, or whatever.

The Court will charge you . . . Mr. Nachman badly misstated the law. The Court will state the correct law in this case. I won't try to do it. I believe that he will charge you as to what is involved here; whether it has to be an actual outflow of money or consolidation of debt, a restructuring or whatever, that qualifies under the Bank Holding Company Act. Mr. Nachman threw in a bunch of straw and tried to make you forget the real issues in the case, and I know you are not going to do that. The real issues are simply this: Did the bank violate the Bank Holding Company Act?

And after you take all of the evidence and look at it . . . And don't be misled, now, about this business of not looking at the documents. I want you to look at the documents. Even it it takes you thirty or forty minutes more, look at the documents. I am not ashamed to base our case on the documents, because if there had been anything wrong with the loan, it would be in the records of the bank. Everybody has admitted that. Everybody. And you won't

* * *

Oral Charge of the Court

[1003] . . . You, as jurors, are not obliged to accept the testimony of any witness even though the testimony is uncontradicted and the witness is not impeached. You may decide because of a witness' appearance or his demeanor or because of the inherent improbability of his testimony or for other reasons sufficient to you, arising from the evidence, that such testimony is not worthy of belief. And after making your own judgment,

you will give the testimony of each witness such credibility, if any, as you may think it deserves.

Now, we have talked a good deal about this Bank Holding Company Act, and I want to mention that Act again to you. It reads in pertinent part as it applies to this case, that, "A bank shall not extend credit or fix or vary the consideration for the extension of credit on a condition or a requirement that the customer provide some service to such bank **[1004]** other than those related to and usually provided in connection with a loan service."

Now, that is what Mr. Parsons says the bank did, and he says that the way they did it was in requiring him to transfer management and ownership, and ownership in this company, to Michael Orange or to Michael Orange's company.

Now, what are we talking about in "usual banking practices?" The Act is not intended to interfere with the conduct of apporpriate, traditional banking practices. Now, what is an appropriate, traditional banking practice or usual banking practice must vary a good deal, depending upon the circumstances of the individual case. And these bankers or banking experts have testified before you about what is or might be usual banking practice. You have heard their testimony.

Now, the Act does not prohibit attempts by banks to protect their loan investments or any other investments, as long as they don't go beyond that; what is appropriate and traditional. It does not interfere with usual banking practices.

For instance, if an automobile dealer wanted to borrow some money from a bank and if that bank informed that automobile dealer that it would let him **[1005]** have the loan only on the condition that the automobile dealer would discount a substantial share of his automobile loans to his customers to this same bank, that if he would transfer his customers' obligations to the same bank with some discount, some profit to them, then that

kind of an agreement or an arrangement would be a tying arrangement, prohibited by the Act, and this would be because the bank would be tying its loan or requiring some certain service from their customer that was not in the usual banking practice, or tying its loan, tying a product or service, to another bank service. That is, the acceptance of the automobile installment paper tied to another product or service. Now, this is a kind of practice which the Act prohibits.

On the other hand, the Act does not prohibit traditional, usual, banking practices designed to safeguard loans. And that would include mortgages; taking mortgages under . . . or secured instruments on real estate or personal property, or any sort of security interest in the personal property; the maintenance of certain balances or the requirement that certain balances be maintained in an account; the requirement of guarantees or guarantees by other persons to pay the loan if the borrower defaults; **[1006]** or the foreclosure of mortgages or other liens in order to collect the money.

Now, in the circumstances of this case, the Plaintiffs do not claim that the Act is violated by acceptance of the three notes which were in default and on which the Defendant foreclosed on January of 1979, nor do they claim that the foreclosure on those notes was in any violation of the Act. The Plaintiffs make no contention that the Defendant violated the Bank Holding Company Act in any way in making, accepting, or foreclosing those notes.

Now, the Plaintiffs in this case have brought this action under the Bank Holding Company Act, claiming that the Defendant, the First Alabama Bank, has violated the provisions of that Act.

The Bank Holding Company Act provides in substance and in material part that a bank shall not in any way fix the consideration for extending credit on the condition or requirement that the customer provide some additional service to such bank other than those related to and usually provided in connection

with a loan. And the burden is on the Plaintiffs in this case to reasonably satisfy you from the evidence — and that means the same thing as to prove by a preponderance of the evidence — in the case these — **[1007]** three things: That in connection with the fixing, the consideration of a loan, or extension of credit, the bank required the Parsons to provide some additional service to the bank — that is, the transfer of the ownership of this business — and that the additional service required was other than a service related to and usually provided in connection with a loan.

It is up to you to decide whether or not the bank . . . whether or not the Plaintiffs have proved those three elements by a preponderance of the evidence in this case.

Now, the Plaintiffs are claiming that the additional service required to be provided to the bank was not related to or usually provided in connection with a loan, was as follows: That the Plaintiffs, the bank, made Michael Orange chief executive officer of Parsons Steel of Montgomery and made . . . excuse me. That they required that the Parsons make Michael Orange chief executive officer and president of Parsons Steel of Montgomery, and make Michael Orange the majority stockholder of that corporation. Now, if they didn't do both of those, then the Plaintiffs' case would fail.

Now, if you are reasonably satisfied from the evidence that in connection with an extension **[1008]** credit or a loan, the bank made that requirement of the Plaintiffs, and you are further satisfied that the requirement is not one related to or usually provided in connection with a loan, then your verdict should be for the Plaintiffs.

I further charge you that as it is used in the Bank Holding Company Act, the term "extension of credit" refers to a consolidation and foregoing overdue collection of existing loans or a renewal of an existing debt, as well as the advancing of additional funds.

Now, that is the contentions of the Plaintiffs.

The Defendants have several defenses. Some of them are in the alternative. First of all, they contend that the Plaintiffs have not proved by a preponderance of the evidence that the bank committed itself to extend or promised to extend any credit to Parsons Montgomery at the time in question. They say, "We didn't plan to lend him any more money, or we never told him we were going to lend him any more money, or we didn't propose to lend him any more money." Now, that is one of their contentions. And any one of these is sufficient, if the Plaintiff has failed to negative it, by a preponderance of the evidence. **[1009]** Any one of these is sufficient as a defense to the bank and if the bank establishes any one of them or the Plaintiffs have failed to negative any one of them by preponderance of the evidence, then you should find for the bank.

The first of them is that the bank says it didn't agree to extend any further credit. Second, it says that the Plaintiff has failed to establish by a preponderance of the evidence that a condition of extending credit the bank required Mr. Parsons to give an option to buy a majority of the stock of Parsons Montgomery to Michael Orange. They say that that was not established by a preponderance of the evidence. And they say further, thirdly, that the Plaintiffs have failed to prove that even if . . . prove by a preponderance of the evidence that even if there was a commitment to extend credit conditioned upon a change in ownership of Parsons Steel Montgomery, that in order to find for the Plaintiff you must also find from a preponderance of the evidence that such a requirement was not an unusual, traditional and appropriate banking practice under the facts of this case. And they say that the Plaintiff has failed to prove by a preponderance of the evidence that it was not a usual, traditional and appropriate banking **[1010]** practice under the circumstances surrounding this case.

Now, they further say as a defense that the officer — and these are interrelated to one or more of the defenses, as I understand it. They say that the officer of the bank made it plain by October the 1st, 1978, before any wrongful conduct was alleged to have taken place, that there would be no further extension of credit to Parsons Steel Montgomery or to Mr. Parsons, and that they stuck with that throughout; that they never had any idea of lending further money to Mr. Parsons. That is their contention.

Now, I charge you further that an agreement to make a loan or to extend credit must involve more than an attempt by a borrower to borrow money from a bank; that the Plaintiffs, by a preponderance of the evidence, must prove to your reasonable satisfaction in order to recover that there was something more than conversation about the possiblity of a loan or an extension of credit. They must prove that there was a definite agreement by the bank to lend the money or to extend credit to Parsons Montgomery if certain conditions were met.

Now, if you are not reasonably satisfied by a preponderance of the evidence that the defense at **[1011]** any time after October 1st, 1978 agreed to lend money or extend credit to Parsons Montgomery, then your verdict should be for the bank, the Defendant.

Now, you will take all of these documents and all of this evidence that has been offered to you and you go back to the Jury Room and you will consider these matters and you will decide upon your verdict.

Your verdict will be on the form . . . One or the other of these two forms. You are simply asked at this stage of the proceeding to find either for the Plaintiffs or the Defendant. You are not asked to fix any amount. That is not your concern at this point, and you simply find for the Defendant or for the Plaintiffs, if you can agree upon such a verdict. That verdict must be the verdict of each of you who will consider the case.

Now, I have had several other jurors sit in on this case so that they could participate in it and hear the evidence, and if any of you have had any sort of emergency, those other jurors would have served instead of the ones who will consider the case. But you will . . . Those four alternates will be excused, temporarily at least. You will be excused from the deliberations and you will be held

* * *

Supreme Court, U.S.
FILED
AUG 7 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 84-1616

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PARSONS STEEL, INC., JIM D. PARSONS and MELBA L. PARSONS, and A. POPE GORDON, Trustee in Bankruptcy for the Estate of PARSONS STEEL INDUSTRIES, INC.,

Petitioners,

vs.

FIRST ALABAMA BANK OF MONTGOMERY, N. A., and EDWARD HERBERT,

Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

PETITIONERS' BRIEF ON THE MERITS

*JAMES JERRY WOOD
JAMES T. SASSER
WOOD AND PARNELL
641 S. Lawrence Street
Montgomery, AL 36101
(205) 832-4202

Counsel of Record for Petitioner, A. Pope Gordon, Trustee in Bankruptcy for the Estate of Parsons Steel Industries, Inc.

FRANK M. WILSON
BEASLEY AND WILSON
418 South Hull Street
Montgomery, AL 36104
(205) 269-2343

Counsel of Record for Petitioners, Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

BEST AVAILABLE COPY

60 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is the Anti-Injunction Statute, 28 U.S.C. §2283, an implied exception to the Full Faith and Credit Act, 28 U.S.C. §1738, so that a federal district court need not give full faith and credit to a state court judgment that a prior federal judgment does not bar a pending state court action?

2. Does the relitigation exception to the Anti-Injunction Statute, 28 U.S.C. §2283, grant a federal district court jurisdiction to review the judgment of a state court that a prior federal judgment does not bar a pending state court action?

3. Is a federal district court authorized by the relitigation exception to the Anti-Injunction Statute, 28 U.S.C. §2283, to enjoin a pending state court proceeding which considered issues which were not, but arguably could have been, raised in an earlier federal action?

4. Is a federal district court authorized by the relitigation exception to the Anti-Injunction Statute, 28 U.S.C. §2283, to enjoin a pending state court proceeding in the absence of a showing of entitlement to an injunction under general equitable principles?

5. Is a litigant bound by a judgment to which he is not a party where the parties to that judgment had no authority to represent him?

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Constitutional Provisions and Statutes Involved	2
Statement of the Case	2
Summary of the Argument	9
Argument:	
I. The District Court Erred In Refusing To Give Full Faith And Credit To The State Court Final Judgment	13
A. The Anti-Injunction Statute Is Not An Implied Exception To The Full Faith And Credit Act	13
B. The District Court Lacked Jurisdiction To Review A State Court Judgment	16
II. The District Court Erred In Enjoining A Pending State Court Proceeding	18
A. The Courts Below Improperly Construed The Anti-Injunction Statute To Authorize An Injunction Of A State Court Proceeding Any Time A Federal Judgment Precludes A State Action Under Res Judicata Principles	18
B. Principles Of Comity And Federalism Prohibit An Injunction In This Case	26

C. General Equitable Principles Prohibit An Injunction In This Case 28

III. A Litigant Is Not Bound By A Judgment To Which He Is Not A Party Where The Parties To That Judgment Had No Authority To Represent Him .. 32

A. The Trustee In Bankruptcy Should Not Be Estopped From Litigating His State Court Claims When The Trustee In Bankruptcy Was Not In Privity Or Virtually Represented By The Plaintiffs In The Federal Action 32

B. The Decision Below Deprived The Trustee Of A Full And Fair Opportunity To Litigate His Claim In Violation Of The Requirements Of Due Process 39

Conclusion 45

TABLE OF AUTHORITIES

Cases:

Allen v. McCurry, 449 U.S. 90, 66 L.Ed.2d 308, 101 S.Ct. 411 (1980) 14, 39

Amalgamated Clothing Workers of America v. Richman Brothers, 348 U.S. 511, 99 L.Ed. 600, 75 S.Ct. 452 (1955) 23

Angel v. Bullington, 330 U.S. 183, 91 L.Ed. 832, 67 S.Ct. 657 (1947) 14

Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 26 L.Ed.2d 234, 90 S.Ct. 1739 (1970) 10, 17, 19, 24, 28

Bank of Heflin v. Miles, 621 F.2d 108 (5th Cir. 1980) ... 27

Blonder-Tongue Laboratories, Inc. v. University of Illinois, 20 U.S. 313, 28 L.Ed.2d 788, 91 S.Ct. 1434 (1971) 39

Charter Oak Fire Insurance Co. v. Sumitomo Marine Fire Insurance Co., Ltd., 750 F.2d 257 (3rd Cir. 1984) 32, 34, 35

County of Imperial, California v. Munoz, 449 U.S. 54, 66 L.Ed.2d 258, 101 S.Ct. 289 (1980) 23

Del Mar Avionics v. Quinton Instruments Company, 645 F.2d 832 (9th Cir. 1981) 32, 35

Delta Airlines, Inc. v. McCoy Restaurants, Inc., 708 F.2d 585 (5th Cir. 1983) 37

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 75 L.Ed.2d 206, 103 S.Ct. 1303 (1983) 17

Expert Electric Company v. Levin, 545 F.2d 1227 (2d Cir. 1977) 32, 33

First Alabama Bank v. Parsons Steel, Inc., 747 F.2d 1367 (11th Cir. 1984) 8

General Foods Corp. v. Massachusetts Department of Public Health, 648 F.2d 784 (1st Cir. 1981) 32

Hansberry v. Lee, 311 U.S. 32, 85 L.Ed. 22, 61 S.Ct. 115 (1940) 39, 40

Huffman v. Pursue Limited, 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200, *reh. denied,* 421 U.S. 971, 44 L.Ed.2d 463, 95 S.Ct. 1969 (1975) 29

Humphreys v. Tann, 487 F.2d 666 (6th Cir. 1973), *cert. denied,* 416 U.S. 956, 40 L.Ed.2d 307, 945 S.Ct. 1970 (1974) 32

In Re: Parsons Steel Industries, Inc., a Bankrupt, No. 79-173-N (U.S. Bankruptcy Court M.D. Ala.) 3

Kremer v. Chemical Construction Corp., 456 U.S. 461, 72 L.Ed.2d 262, 102 S.Ct. 1883, *reh. denied,* 458 U.S. 1133, 73 L.Ed.2d 1405, 103 S.Ct. 20 (1982) .. 9, 15

Local Loan Company v. Hunt, 292 U.S. 234 (1934) 23

Looney v. Eastern Texas Railroad Company, 247 U.S. 214 (1918) 23

Matter of Jacoby, 138 F.2d 42 (3rd Cir. 1943) 38

Mitchum v. Foster, 407 U.S. 225, 32 L.Ed.2d 705, 92 S.Ct. 2151 (1972) 19, 23, 26, 28

Montana v. United States, 440 U.S. 147, 59 L.Ed.2d 210, 99 S.Ct. 970 (1979) 14, 32, 34, 41

Nevada v. United States, 462 U.S. 1104, 77 L.Ed.2d 509, 103 S.Ct. 2906 (1983) 40, 41

Parsons Steel, Inc. v. First Alabama Bank, 679 F.2d 242 (11th Cir. 1982) 5, 21

Parsons Steel, Inc. v. First Alabama Bank of Montgomery, N.A., Civil Action No. 79-259-N (M.D. Ala. 1981) 4, 20

Parsons Steel Industries, Inc. v. First Alabama Bank of Montgomery, No. CV-79-179-G (Circuit Court for Montgomery County, Alabama) 3

Ransberry Corporation v. Automatic Finishing Systems, Inc., 412 F.Supp. 1357 (E.D.Pa. 1976) .. 35

Ray v. Tennessee Valley Authority, 677 F.2d 818 (11th Cir. 1982) 43

Rooker v. Fidelity Trust Company, 263 U.S. 413, 68 L.Ed. 362, 44 S.Ct. 149 (1923) 10, 17

Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 366 (1921) 23

Toucey v. New York Life Insurance Company, 314 U.S. 118, 86 L.Ed. 100, 62 S.Ct. 139 (1941) 15, 23

Vendo Company v. Lektro-Vend Corporation, 433 U.S. 623, 53 L.Ed.2d 1009, 97 S.Ct. 2881 (1977) 23, 26

Woods Exploration and Producing Company v. Aluminum Company of America, 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047, 30 L.Ed.2d 736, 92 S.Ct. 701 (1972) 42

Younger v. Harris, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971) 29

Statutes:

Bankruptcy Act of 1979, 11 U.S.C. §101 (1979) 3

11 U.S.C. §1 (1977) 3

Bank Holding Company Act, 12 U.S.C. §§1971 et seq. (1978) 4, 11, 36, 43

Anti-Injunction Statute, 28 U.S.C. §2283 (1977) 2, 7, 8, 10, 13, 18, 22, 23

Full Faith and Credit Act, 28 U.S.C. §1738 (1977) .. 2, 8, 10, 13

28 U.S.C. §1254(1) (1977) 2

28 U.S.C. §§1330-1363 (1977) 16

28 U.S.C. §§1291-1294 (1977) 16

Federal Habeas Corpus Act, 28 U.S.C. §2254 (1977) ... 14

Act of March 2, 1793, Ch. 22, §8, 1 Stat. 335 22

Act of May 26, 1790, Ch. 11, 1 Stat. 122 13

Revised Statutes of 1874, Ch. 12 §720, 18 Stat. 134 22

Code of Alabama, §7-9-504 (1975) 44

Code of Alabama, §7-9-507 (1975) 44

Constitutional Provisions:

Constitution of the United States, Article IV, §1 13

Constitution of the United States, Article III §1 16

Constitution of the United States, Amendment V 2

Other Authorities:

Clark, *"The Handmaid of Justice"*, 23 Wash. U.L.Q. 297 (1938) 42

Colliers on Bankruptcy, Vol. 4, §704 (15th ed. 1985) ... 38

Colliers on Bankruptcy, Vol. 4(A), §70.01 p. 84 (14th ed. 1983) 38

Federal Rules of Civil Procedure, Rule 16 44

Note, *"Collateral Estoppel of Non-Parties"*, Harvard Law Review, Vol. 87:1485 (1974) 39

Cordell, *"The Expanding Scope of the Res Judicata Bar"*, 54, Texas L. Rev. 527 (1976) 40

1B Moore's Federal Practice, §0.408[3] (2d ed. 1983) ... 16

1B Moore's Federal Practice §0.416[2] (2d ed. 1983) 21

1B Moore's Federal Practice §0.443[5.1] (2d ed. 1983) .. 44

Restatement (Second) of Judgments §26 page 233 (1982) 31

Restatement (Second) of Judgments §24 (1982) 8

Restatement (Second) of Judgments, §59(3)(b) (1982) .. 38

Reviser's Note, H.R. Rep. No. 308, 80th Cong. First Sess. A181-182 (1947) 23

Wright, Miller and Cooper, Federal Practice and Procedure, §4404 (1983) 16

Wright, Miller and Cooper, Federal Practice and Procedure, §318 (1981) 34

No. 84-1616

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PARSONS STEEL, INC., JIM D. PARSONS and MELBA L. PARSONS, and A. POPE GORDON, Trustee in Bankruptcy for the Estate of PARSONS STEEL INDUSTRIES, INC.,

Petitioners,

VS.

FIRST ALABAMA BANK OF MONTGOMERY, N. A., and EDWARD HERBERT,

Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

PETITIONERS' BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 747 F.2d 1367 and appears as Appendix A to the Petition for Certiorari; the opinion of the trial court, the United States District Court for the Middle District of Alabama, is unreported and appears as Appendix B to the Petition for Certiorari.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on December 3, 1984. A timely

Petition for Rehearing and Suggestion for Rehearing En Banc was filed and was denied on January 14, 1985. On January 24, 1985, the Court of Appeals entered its judgment. The Petition for Writ of Certiorari was filed on March 15, 1985, and granted on June 24, 1985. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution Of The United States, Amendment V

No person shall be...deprived of life, liberty, or property, without due process of law;...

Full Faith And Credit Act, 28 U.S.C. §1738

The judicial proceedings of any court of such State...shall have the same full faith in credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State ...

Anti-Injunction Statute, 28 U.S.C. §2283

A Court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

STATEMENT OF THE CASE

On February 15, 1979, Parsons Steel, Inc., (hereinafter "Parsons-Mobile") its wholly owned subsidiary, Parsons Steel Industries, Inc., (hereinafter "Parsons-Montgomery") and its shareholders, Jim D. Parsons and Melba L. Parsons (hereinafter collectively referred to as "Parsons") filed an action in the Circuit Court for Montgomery County, Alabama, against First Alabama Bank (hereinafter "Bank"), its loan officer, Edward Herbert (hereinafter "Herbert"), Michael

Orange (hereinafter "Orange"), and OSI, Inc., a corporation owned by Orange, *Parsons Steel Industries, Inc., et al. v. First Alabama Bank of Montgomery, N.A., et al.*, No. CV-79-179-G, Circuit Court for Montgomery County, Alabama, (hereinafter "State Action"). Parsons-Montgomery sought damages from Bank for a series of false representations beginning in January and continuing through December, 1978, breach of fiduciary duty, conversion, and violation of the Uniform Commercial Code in the sale of repossessed collateral. The alleged commercially unreasonable sale of substantially all the assets of Parsons-Montgomery occurred on January 17, 1979, and Parsons-Montgomery also invoked the equitable jurisdiction of the state court to set aside that sale and to obtain an accounting of the assets sold. (A. 55). Parsons-Mobile and Parsons sought separate damages they had incurred as a result of Bank's actions. Separate claims including fraud, breach of fiduciary duty and conversion were made by all Plaintiffs against Orange and OSI. (A. 44-59).

On April 5, 1979, Parsons Steel Industries, Inc. was adjudicated an involuntary bankrupt on petition of three creditors. (A. 292) *In Re: Parsons Steel Industries, Inc., a Bankrupt,* No. 79-173-N, United States Bankruptcy Court, Middle District of Alabama. A. Pope Gordon was appointed Trustee.[1] On June 4, 1979, the Trustee applied to the bankruptcy court for authority to employ Jere L. Beasley as attorney. The bankruptcy court ruled Mr. Beasley could not represent the Trustee because he represented Parsons-Mobile and Parsons and a conflict of interest might arise.[2] (A. 293-4). On July 27,

[1] The Trustee of this Estate was appointed under the former 11 U.S.C. §1, et seq. (Bankruptcy Act of 1898) in that the debtor was adjudicated bankrupt prior to October 1, 1979, the effective date of the "new" Bankruptcy Code (11 U.S.C. §101, et seq.) Mr. Gordon has since been appointed Bankruptcy Judge and his successor is Thomas A. McGregor. To avoid confusion Petitioners will continue to refer to Gordon as Trustee for purposes of this brief.

[2] The bankruptcy court was proven correct when it later became necessary for the Trustee to file suit against Parsons-Mobile and Parsons to attempt to collect more than $250,000.00 of fraudulent conveyances and preferential transfers.

1979, James Jerry Wood was appointed attorney for Trustee and has since served in that capacity. (A. 295).

In the interim, on May 30, 1979, Parsons-Mobile and Parsons filed a second action against Bank in federal court, *Parsons Steel, Inc., et al. v. First Alabama Bank of Montgomery, N.A.*, Civil Action No. 79-259-N (M.D. Ala. 1981) (hereinafter "Federal Action").[3] (A. 60-71). Parsons-Montgomery was not a Plaintiff in that lawsuit and neither Herbert, Orange, nor OSI was a Defendant. No damages were sought on behalf of Parsons-Montgomery. Parsons-Mobile and Parsons had no authority to file suit on behalf of Parsons-Montgomery since by that time that corporation had been adjudicated a bankrupt and a trustee appointed. (A. 292).

The Federal Action alleged *only* one claim, that Bank had conditioned an extension of credit upon the requirement of a change in management and ownership in violation of the Bank Holding Company Act (hereinafter "BHCA") 12 U.S.C. §§1971 et seq. Bank contended throughout the Federal Action that Parsons-Mobile and Parsons had no standing to bring that action since any damages were incurred solely by Parsons-Montgomery. (A. 259-62). The federal court repeatedly rejected that contention. (A. 359). Bank did not, however, seek to have the Trustee for Parsons-Montgomery joined as an indispensable party to the Federal Action. Neither did Bank suggest to either the state court or federal court that the claim was the same in both actions or that Plaintiffs were splitting their cause of action.

In its motion to dismiss (A. 259-260), motion for summary judgment (A. 261-62), and motion for reconsideration of order denying summary judgment (A. 265-66) Bank asserted that the federal court had no jurisdiction of the Federal Action. Because it had substantial doubts that the allegations of the

---

[3] The district court on motion of all parties took judicial notice of the proceedings in the Federal Action and the entire record of that case is a part of the record here.

Federal Action constituted a violation of the BHCA the court ordered the issue of liability tried separate from the issue of damages. (A. 278). Bank continued to assert lack of jurisdiction in the pre-trial order, (A. 276) in its motion for directed verdict and again in its motion to vacate or dismiss after a jury verdict (A. 283) in Plaintiffs' favor on the issue of liability. (A. 289).

On June 17, 1981, the trial court granted Bank's motion for judgment n.o.v. and set aside the jury verdict. Although it had denied Bank's motion for directed verdict at the end of Plaintiffs' evidence and again at the end of all the evidence the trial court inexplicably held that Plaintiffs had failed to introduce sufficient evidence to sustain the jury's verdict on *any* element of a BHCA violation. (A. 72-88).

The United States Court of Appeals for the Eleventh Circuit affirmed but held that the facts alleged did not constitute a tying arrangement prohibited by the BHCA. *Parsons Steel, Inc. v. First Alabama Bank,* 679 F.2d 242, 251 (11th Cir. 1982). On appeal Bank continued to assert that the district court lacked jurisdiction of the Federal Action and that Plaintiffs there lacked standing.

On October 24, 1979, Bank and Herbert moved to have the Trustee joined as an indispensable party to the State Action because his absence might leave the Defendant "subject to a substantial risk of incurring double, multiple or inconsistent obligations by reason of the Trustee's claim." (A. 216). The state court granted Bank's motion (A. 254). The Trustee applied to the bankruptcy court for permission to pursue that litigation and permission was granted. (A. 297). The bankruptcy court found that the State Action was an asset of the bankrupt estate and that it was in the best interest of the creditors to pursue the claim. (A. 217).

On March 25, 1982, Bank and Herbert filed answers in the State Action and asserted a counterclaim. (A. 241). Bank and Herbert denied the Plaintiffs' claims, asserted affirmative

defenses of waiver, estoppel, consent, lack of standing and res judicata. Bank filed a request for production of documents and issued third party subpoenas in preparation of its counterclaim.

On June 11, 1982, the Trustee amended his complaint in the State Action to allege commercially unreasonable behavior by Bank and Herbert in the sale of substantially all the assets of Parsons-Montgomery. (A. 35-36). Trustee filed an additional claim against Orange for the proceeds of a note to Parsons-Montgomery and for conversion of the cash value of a life insurance policy owned by the bankrupt. (A. 37).

Bank and Herbert presented their res judicata defense by motion for summary judgment to the state court which held that the federal judgment did not bar the State Action. (A. 219). The judge assigned to the case found it necessary to recuse himself and Bank and Herbert presented their res judicata defense by motion for summary judgment to a second state court judge (A. 227), who again denied the motion. (A. 250).

The State Action was set for trial and all parties filed contentions setting out the issues to be tried. (A. 221-26). A pro tanto settlement was reached with Defendants Orange and OSI on the eve of trial. Bank and Herbert then asserted a cross-claim against Orange and OSI in the State Action which is still pending in state court. (A. 237). Bank and Herbert also amended their answers to assert the additional affirmative defense that the settlement released them as well. (A. 239-40).

Beginning January 31, 1983, the State Action was tried for nine days. Bank and Herbert presented evidence in support of their several affirmative defenses. The jury returned verdicts in favor of Trustee in the amount of $2,000,000.00, in favor of Parsons-Mobile in the amount of $1.00 and in favor of Parsons in the amount of $2,000,000.00. (A. 251). The trial court entered a final judgment on the jury verdict. (A. 252). Bank and Herbert moved for judgment n.o.v. and for new trial. (A. 96-105).

Prior to a decision on their post-judgment motions in state court Bank and Herbert filed this action in federal district court seeking to enjoin Petitioners from pursuing the State Action judgment. Bank and Herbert's request for injunctive relief was premised on the Anti-Injunction Statute, 28 U.S.C. §2283, and their contention — previously rejected by the state court — that the judgment in the Federal Action precluded the State Action. (A. 1-100). Although not a party to the federal judgment, Herbert sought to use it to enjoin the judgment against him as well.

The district court in an unprecedented decision entered judgment in favor of Bank and Herbert and enjoined Petitioners from further prosecution of the State Action. (Pet.Cert. A-31). The district court made no finding that the injunction was necessary to "protect or effectuate" its prior judgment but instead based the injunction solely on its conclusion that the judgment in the Federal Action barred the State Action although recognizing the two actions asserted different causes of action.[4] The district court refused to give full faith and credit to the state court's decision on the res judicata issue. The district court also enjoined the Trustee for Parsons-Montgomery although he was not a party to the Federal Action. The district court made no finding that Trustee had been "virtually represented" by the parties to the Federal Action or that those parties had authority to represent him. The district court enjoined the judgment against Herbert as well although he was not a party to the Federal Action or the judgment there.

---

[4] "A slightly different question arises in a situation where different causes of action arising from the same factual circumstances are alleged in a second suit." *First Alabama Bank v. Parsons Steel,* No. 83-V-181-N (M.D. Ala., June 15, 1983). (Pet.Cert. A-32).

The United States Court of Appeals for the Eleventh Circuit affirmed. *First Alabama Bank v. Parsons Steel,* 747 F.2d 1367 (11th Cir. 1984). The majority held that the Anti-Injunction Statute, 28 U.S.C. §2283 is an implied exception to the Federal Full Faith and Credit Act, 28 U.S.C. §1738, so that the district court was not required to give full faith and credit to the state court decision that the federal judgment did not preclude the State Action.[5] The majority further held that it was within the district court's discretion to enjoin the litigation of issues which were not but in its opinion "could have been" litigated in the Federal Action even though Bank awaited a decision by the state court before seeking the injunction. 747 F.2d at 1375. (Pet. Cert. A-13). The majority did not apply general equitable principles to the request for an injunction and found that the State Action was barred by the federal judgment only by applying a broad definition of claim preclusion which includes all causes of action arising out of the same "series of transactions."[6]

The majority held that the Federal Action plaintiffs were the virtual representatives of Trustee as to the fraud claim but remanded to the district court to determine whether virtual representation existed as to Trustee's Uniform Commercial Code claim. It is critical to note that neither court below found that the Plaintiffs in the Federal Action had authority to represent the Trustee. The majority's decision appears to have been based primarily on its erroneous conclusion that the Federal Action was pending at the time Parsons-Montgomery was ad-

---

[5] Not only does the majority opinion represent the first occasion on which the Anti-Injunction Statute has been held to be an exception to the Full Faith and Credit Act, it represents the first implied exception to the Act *any court* has found.

[6] *See* Restatement (Second) of Judgments §24. This definition of claim for preclusion purposes was not adopted by the American Law Institute until after these actions were filed and has never been adopted by this Court.

judicated a bankrupt so that it became an asset of the bankrupt estate. 747 F.2d at 1379 (Pet. Cert. A-22). It is undisputed that the Federal Action was filed *after* Parsons-Montgomery was adjudicated a bankrupt and its shareholders had lost all legal authority to act for the corporation.

In a vigorous dissent, Judge James C. Hill reasoned that the Anti-Injunction Statute did not implicitly amend the Full Faith and Credit Act because the two acts can be construed harmoniously. For that reason the district court was required to give full faith and credit to the state court judgment. Judge Hill further opined that the district court erred in granting the injunction because the State Action and Federal Action involved "different parties and, arguably, different causes of action" so that an injunction was not necessary to "protect or effectuate" the federal judgment. In addition, Bank and Herbert awaited a judgment on the merits in state court before seeking an injunction which further "complicates the relations between state and federal courts. 747 F.2d at 1382. (Pet.Cert. A-29).

SUMMARY OF THE ARGUMENT

The injunction of a pending state court proceeding in these circumstances must be reversed. The district court erred in refusing to give full faith and credit to the state court judgment that the federal judgment was not a bar to the State Action. The plain wording of the Full Faith and Credit Act and this Court's decisions interpreting it clearly require full faith and credit in these circumstances. The Anti-Injunction Statute is not an implied exception to the Full Faith and Credit Act because the two statutes can be read consistently. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). Until the state court rendered a final judgment Bank and Herbert could have sought an injunction authorized by the Anti-Injunction Statute. Neither does the passage the Anti-Injunction Statute suggest any "clear and manifest" intention to repeal the Full Faith and Credit Act.

The Court of Appeals' concern that failure to recognize the Anti-Injunction Statute as an implied exception would cause a party with a federal judgment to rush back to federal court any time a state court might rule on the res judicata issue is totally unfounded because where, as here, a litigant submits its res judicata defense to a state court in pretrial motions the orders denying those motions are not final judgments. Because 28 U.S.C. §1738 requires that full faith and credit be given only to final judgments, a litigant can seek a federal injunction at any time prior to a final judgment in state court.

The decision below impermissibly expands the limited jurisdiction of a federal district court to allow direct review of a state court decision in these circumstances. The district court's decision to grant an injunction was based solely on its decision that the earlier federal judgment precluded the State Action. The only way it could reach that decision was to reconsider the issue — already presented to the state court — and in effect reverse the state court judgment. This Court has exclusive jurisdiction to sit in appellate review of state court decisions. *Rooker v. Fidelity Trust Company,* 263 U.S. 413 (1923). Since this court will review those decisions only after review by the highest state court, state courts have a full opportunity to avoid federal interference. In addition this Court can exercise its ultimate authority to resolve conflicts between co-existing independent court systems without upsetting the balance of federalism.

The district court's injunction of a pending state court proceeding was barred by the Anti-Injunction Statute, 28 U.S.C. §2283. *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers,* 398 U.S. 281 (1970). The courts below improperly construed the Anti-Injunction Statute to authorize an injunction of a state court proceeding anytime a prior federal judgment precludes a state action. In this case, the final judgment in the Federal Action was that of the Court of Appeals for the Eleventh Circuit holding as a matter of law that the Bank's

actions did not violate the Bank Holding Company Act, a narrowly drawn prohibition against "tying arrangements." 12 U.S.C. §1972. No issue litigated in the Federal Action was repeated in the State Action. The plain wording of the Anti-Injunction Statute, its legislative history, and this Court's decisions which construe it limit an injunction to issues actually raised and litigated in the prior federal action. The only justification suggested for an injunction of issues which were not, but arguably "could have been" litigated — convenience to the winning party in federal court — is not important enough to form the basis for intervention into a state court proceeding.

Assuming *arguendo* the Anti-Injunction Statute did not bar the injunction in this case, principles of comity and federalism prohibited it. The district court's need to "protect or effectuate" its earlier judgment is at best minimal since no issue presented in the State Action was litigated in that judgment. There could be no greater intrusion into a state court proceeding than occurred in this case. The injunction came after a nine-day trial in state court in which the preclusive effect of the federal judgment was fully litigated. Such a minimal need to protect a judgment cannot form the basis for such an extensive intrusion into the state court function.

The injunction is also barred by the application of general equitable principles. There has been no suggestion that Bank and Herbert will not receive a fair and full adjudication of the res judicata issue in state court. They therefore have an adequate remedy at law. Whatever inconvenience they might suffer from prosecuting an appeal in Alabama appellate courts is not a sufficient basis for the injunction of a state court proceeding. The only possible way to conclude Bank and Herbert lack an adequate remedy at law is to hold that the Alabama appellate courts are inadequate to decide this issue. In our federal system state courts are the primary protectors of federal constitutional rights subject to review by this Court.

Bank and Herbert waived their right, if any, to an injunction of the state court proceeding by asserting claims of their own in the State Action and by submitting their defense on the merits along with the res judicata issue to the state court. The district court's decision that an individual cannot waive his right to seek an injunction in these circumstances is erroneous as a matter of law.

The Trustee should not be estopped from litigating his state court claims when he was not in privity or virtually represented by the plaintiffs in the Federal Action. In the Federal Action, the Trustee had no control, extended no authority for the plaintiffs to represent him, and no claims were made on behalf of the bankrupt corporation. The Federal Action was based on a very limited issue under the Bank Holding Company Act. The district court recognized the Trustee had no interest in the Federal Action by continuously denying the Bank's motions raising the issue of plaintiffs' standing. The district court has refuted its orders in that case and has now held that Parsons-Montgomery, and therefore the Trustee, was the primary party damaged by a violation of the Bank Holding Company Act.

In light of all of the circumstances, it would be unfair to give preclusive effect to the federal judgment so as to keep Trustee from fully and fairly litigating his state court claims. By depriving the Trustee of his opportunity to fully and fairly litigate his claims, the Trustee is being denied due process. The pretrial order in the Federal Action gave no clue to the Trustee that any of his interests were at stake in that action. The only issue decided in the Federal Action was that the facts alleged did not constitute a tying arrangement prohibited by the BHCA. The Trustee's only chance to present evidence and arguments in support of claims and interest occurred in the State Action.

ARGUMENT

I. The District Court Erred In Refusing To Give Full Faith And Credit To The State Court Final Judgment.

A. The Anti-Injunction Statute Is Not An Implied Exception To The Full Faith And Credit Act.

The district court refused to give full faith and credit to the state court's determination that the federal judgment did not bar the State Action. The res judicata issue was presented by Bank and Herbert as an affirmative defense and a decision on that issue was necessary to the final judgment in state court. The court of appeals upheld the district court by finding the Anti-Injunction Statute, 28 U.S.C. §2283, an exception to the Full Faith and Credit Act, 28 U.S.C. §1738.

The foundation of our federal system is Article IV, §1 Constitution of the United States:

> Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Our forefathers found that principle so important that one of the first acts of Congress was the passage of the Federal Full Faith and Credit Act. Act of May 26, 1790, Ch. 11, 1 Stat. 122. The Act, now codified as 28 U.S.C. §1738, provides in pertinent part:

> The judicial procedings of any court of such state...shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State...

This Court has consistently held that §1738 requires federal courts to apply collateral estoppel to issues decided by state

courts. *Allen v. McCurry,* 449 U.S. 90 (1980); *Montana v. United States,* 440 U.S. 147 (1979); *Angel v. Bullington,* 330 U.S. 183 (1947). When a state court has first adjudicated an issue the application of collateral estoppel serves to "promote the comity between state and federal court that has been recognized as a bulwark of the federal system." *Allen v. McCurry,* 449 U.S. at 96.

It is quite clear that an exception to §1738 can be recognized *only* where a later statute contains an express or implied partial repeal. *Allen v. McCurry, supra; Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 468 (1982).[7] The Full Faith and Credit Act is so fundamental to our federal system that prior to the Court of Appeals decision in this case authorization for a federal court to re-examine a state court judgment had been found *only* in the Federal Habeas Corpus Act 28 U.S.C. §2254 which expressly provides for review in certain narrow situations. No court had found an implied exception.

In *Kremer v. Chemical Construction Corp.,* 456 U.S. 461 (1982), this Court reaffirmed the cardinal principle that repeals by implication are not favored and taught that whenever possible statutes must be read consistently. A repeal by implication may be recognized only where the provisions of the two acts are in irreconcilable conflict.

The court of appeals disregarded a simple method of reading these two statutes consistently. Judge Hill, in dissent, articulated that method:

> I would conclude that Section 2283 allows the district court to enter an injunction, perhaps grounded in the concept of res judicata, unless the state court has already addressed the res judicata issue on the merits. In cases in which the

---

[7] The court of appeals does not suggest that its unprecedented decision is founded on an express exception. 747 F.2d at 1376. (Pet. Cert. A-15).

> state court has reached the merits, I would hold that section 1738 requires the federal court to afford full faith and credit to the state court's resolution of the issue.

747 F.2d 1381. (Pet. Cert. A-27)

The lack of any direct incompatibility between §2283 and §1738 is alone sufficient to negate an implied repeal. *Kremer v. Chemical Construction Company,* 456 U.S. at 470. Neither does the purpose of passing the Anti-Injunction Statute suggest any "clear and manifest" intention to repeal. Until the passage of the 1948 Amendment the statute was an absolute prohibition an injunction of a state court proceeding. The 1948 amendment was intended to restore the basic law as understood and interpreted prior to *Toucey v. New York Life Insurance Co.*, 314 U.S. 118 (1921). Since no case prior to *Toucey* allowed a federal court to relitigate an issue previously litigated in a state court the amendment cannot be interpreted as granting that authority.[8]

The only policy reason articulated by the court of appeals majority to support its decision is its suggestion that if full faith and credit were given to a state court judgment a party with a prior federal judgment would be required to "rush back to federal court for a res judicata ruling any time there was a possibility that a state court might rule on the issue first." 747 F.2d at 1376 n.13 (Pet.Cert. A-16) This case clearly shows that concern is unfounded. Bank and Herbert presented their res judicata defense twice to the state court in pretrial motions. The orders denying those motions were *not* final judgments. Because §1738 requires that full faith and credit be given only to a final judgment a litigant could seek a federal injunction *at any time* prior to a final judgment in state court. Bank and Herbert had ample opportunity to do just that but instead chose to defend on the merits.

---

[8] The legislative history of the Anti-Injunction Statute is discussed in more detail at pages 22-23 of this brief.

Both major treatises on federal practice and procedure support Judge Hill's analysis. Professor Moore suggests that a party in the position of Bank and Herbert has an *alternative* - either ask the federal court to enjoin state court litigation it contends is barred by a prior federal judgment or submit the matter to the state court and thereby assert an issue which can later form the basis for an appeal to this Court. Moore's Federal Practice, §0.408[3] (1983). *See also,* Wright, Miller and Cooper, Federal Practice and Procedure, §4404 at page 28-29 (1983).

The provisions of the Anti-Injunction Statute and the Full Faith and Credit Act are not in irreconcilable conflict. Neither the language nor legislative history of the Anti-Injunction Statute indicates an intent by Congress to repeal the Full Faith and Credit Act. The district court was required to give full faith and credit to the state court judgment. Because it failed to do so its injunction must be reversed.

B. The District Court Lacked Jurisdiction To Review A State Court Judgment.

The court of appeals majority's interpretation of the interaction of the Full Faith and Credit Act and the Anti-Injunction Statute impermissibly expands the limited jurisdiction of a federal district court to allow direct review of a state court judgment in these circumstances.

The Constitution of the United States, Article III, Section 1 provides:

> The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain or establish.

In establishing our federal court system Congress granted limited original jurisdiction to district courts[9] and limited appellate jurisdiction to courts of appeal.[10]

---

[9] *See:* 28 U.S.C. §§1330-1363.

[10] *See:* 28 U.S.C. §§1291-1294.

> While the lower federal courts were given certain powers in the 1789 Act, they were not given any power to review directly cases from state courts, and they have not been given such powers since that time. Only the supreme court was authorized to review on direct appeal the decision of state courts.

Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 286 (1970).

This Court has on more than one occasion upheld its exclusive jurisdiction to sit in appellate review of state court judgments. In *Rooker v. Fidelity Trust Company,* 263 U.S. 413 (1923) the losing party in a state court action sued in federal district court to have the state judgment set aside alleging a denial of due process of law. The district court dismissed for lack of jurisdiction and this court affirmed:

> Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment....To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.

263 U.S. at 416.[11]

It cannot be denied that the district court exceeded its jurisdiction and violated this Court's decision in *Rooker.* Bank and Herbert submitted their contention that the federal judgment precluded the State Action to the state court. The state trial court considered that issue both in pretrial motions and at trial. A final judgment was entered rejecting that defense. The

---

[11] Similarly in *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983) this Court held that the United States District Court for the District of Columbia had no jurisdiction to review proceedings of the District of Columbia Court of Appeals in a bar admission matter.

district court was able to grant the injunction only by reconsidering the res judicata defense previously rejected by the state court. Its action was an unauthorized exercise of appellate jurisdiction.

Important policy considerations underlie the decision to grant *only* this Court authority to review state court judgments. Since this Court will review such judgments only after review by the highest state court, state courts have a full opportunity to avoid federal interference. In addition, this Court, the highest court of the land, can exercise its ultimate authority to resolve conflicts between co-existing independent court systems without upsetting the balance of federalism. Where, as in this case, a federal district court reviews a decision of state court and reverses that decision the balance of federalism is destroyed.

Because the district court had no authority to exercise appellate jurisdiction over the state court decision its injunction must be reversed.

II. The District Court Erred In Enjoining A Pending State Court Proceeding.

A. The Courts Below Improperly Construed The Anti-Injunction Statute To Authorize An Injunction Of A State Court Proceeding Anytime A Federal Judgment Precludes A State Action Under Res Judicata Principles.

The Anti-Injunction Statute, 28 U.S.C. §2283, provides that:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or *where necessary* in aid of its jurisdiction, or *to protect or effectuate its judgments.*

(Emphasis supplied). The statute "imposes an absolute ban upon the issuance of a federal injunction against a pending state court proceeding" unless it fits one of three specific exceptions

which must be narrowly construed. *Mitchum v. Foster,* 407 U.S. 225 (1972); *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers,* 398 U.S. 281 (1970). In this case the courts below attempted to justify the injunction as "necessary...to protect or effectuate" the federal judgment.

It is clear beyond argument that no issue actually litigated in the Federal Action was presented in the State Action. The issues presented in the Federal Action are set out in the pre-trial order in that case.

> 5. Statement of Plaintiffs' Case: A. The Plaintiffs contend that the Defendant, a national banking association, violated Title 12 U.S.C. §1972, by placing certain requirements on Plaintiffs - the Defendant's customers - as conditions to making additional loans and extending credit to Parsons Steel Industries, Inc. These conditions were not of such nature as to be usually provided to a bank by a customer in connection with a loan. Plaintiffs were at the time customers of Defendant for the purposes of 12 U.S.C. §1971 *et seq.,* and specifically §§ 1972 and 1975.

(A. 280).

Bank and Herbert's contention that any issue raised in the State Action was actually litigated in the Federal Action is impossible to reconcile with the issues outlined in the pre-trial order. A review of the district court's order denying motion for summary judgment (A. 359), Bank's jury argument (A. 408, 466), and the district court's instructions to the jury (A. 399, 471-72) confirm that these were the only issues litigated in the Federal Action.[12]

---

[12] "And the burden is on the Plaintiffs in this case to reasonably satisfy you from the evidence — and that means the same thing as to prove by a preponderance of the evidence — in the case three things: that in connection with the fixing, the consideration of a loan, or ex-

Bank and Herbert argued to the court of appeals in this case that the district court's order granting judgment n.o.v. in the Federal Action constituted "findings of fact" on certain State Action issues. The court of appeals majority accepted that argument and used it to support its holding that the Trustee, a non-party to the Federal Action, was barred from pursuing his fraud claim under principles of collateral estoppel. 747 F.2d at 1371. The argument is erroneous for several reasons.

The trial court in the Federal Action granted Bank's motion for judgment n.o.v. and held that the Plaintiffs failed to introduce sufficient evidence to sustain a jury verdict on any element of a BHCA violation. (A. 72-88). No "findings of fact" were made. Any discussion of matters other than the issues presented was immaterial to the court's decision and mere dicta. In addition, evidence was presented to support the jury verdict on each of the elements of a BHCA violation.[13]

Finally, and most importantly, the court of appeals in the Federal Action recognized that the trial court erred in holding Plaintiffs' evidence was not sufficient to create a jury question but held:

---

tension of credit, the Bank required the Parsons to provide some additional service to the Bank — that is, the transfer of the ownership of this business — and that the additional service required was other than a service related to and usually provided in connection with a loan.

It is up to you to decide whether or not the Bank . . . whether or not the Plaintiffs have proved these three elements by a preponderance of the evidence in this case." *Parsons Steel v. First Alabama Bank,* No. 79-249-N, Tr. 1006-1007 (A. 472).

[13] See testimony of Jim Parsons (A. 416-17) and June Neely Williams (A. 436-38), in the Federal Action. The district court's opinion shows on its face that the court impermissibly resolved issues of credibility.

> Taking the facts in the light most favorable to Plaintiffs, we find, *as a matter of law,* that a bank's requirement that financial control of an enterprise be placed in new hands when necessary to protect its investment before extending further credit does not constitute a violation of the statute, 12 U.S.C. §1972, absent evidence of a "tying" arrangement. We, therefore, affirm the judgment of the district court.

Parsons Steel v. First Alabama Bank of Montgomery, 679 F.2d 242, 244 (11th Cir. 1982). (Emphasis supplied). That judgment of the court of appeals is the final judgment in the Federal Action for preclusion purposes.

> A judgment affirmed on appeal has conclusive effect, but if the appellate court affirms on grounds that differ from those relied upon by the lower court, the conclusiveness of the judgment as res judicata and as collateral estoppel are governed by the appellate decision.

1B Moore's Federal Practice §0.416[2].

The issues presented in the State Action are outlined in the statement of Parsons and Parsons-Mobile contentions. (A. 224-226). The claims made by the Trustee are discussed in detail at pages 43 and 44 of this brief. Each of the causes of action asserted in the State Action alleged only issues of state law. No issue presented in the State Action had been litigated in the Federal Action.[14]

---

[14] The fact that no issue presented in the State Action was litigated in the Federal Action is alone enough to require reversal of the district court's injunction of the Trustee. The Court of Appeals held that the Trustee was barred by principles of collateral estoppel from litigating the fraud claim. Collateral estoppel can only apply to issues actually litigated in a prior proceeding.

The district court made no finding - nor could it on this record - that an injunction was necessary to "protect or effectuate" the federal judgment. Instead, the courts below avoided the express prohibition of §2283 by expanding the relitigation exception to authorize an injunction *any time* a prior federal judgment bars a state action under principles of res judicata. "It is now settled that the relitigation exception enables a federal court to enjoin state litigation which is precluded by the doctrine of res judicata." 747 F.2d at 1376. (Pet.Cert.A-16)

The plain wording of the Anti-Injunction Statute prohibits an injunction in these circumstances. Congress authorized an exception to the express prohibition against an injunction of a state court proceeding only in the limited circumstance where a state court proceeding could result in a judgment which would nullify or undermine the earlier federal judgment. Since in the instant case no issue of law or fact was decided in the Federal Action and later presented in the State Action it is impossible to conclude that the judgment in the State Action undermined or nullified the federal judgment. The injunction therefore cannot be justified as necessary to "protect or effectuate" the federal judgment.

The legislative and judicial history of the Anti-Injunction Statute also compels the conclusion that the mere applicability of the doctrine of res judicata is not sufficient to justify an injunction of a state court proceeding. The Anti-Injunction Statute had its beginnings as one sentence in the midst of §5 of the 1793 Federal Jurisdiction Act.[15] When Congress enacted the general codification of 1874, the provision appeared for the first time as a separate section and was worded as an absolute prohibition on "any court of the United States" with one noted ex-

---

[15] Act of March 2, 1793, Ch. 22, §8, 1 Stat. 335.

ception.[16] Although there is no legislative history surrounding this revision the action of Congress in providing a separate section for the prohibition and making its language more specific and direct indicates a continuing and increasing interest in prohibiting interference with state courts.

The only change in wording of the statute since 1874 is the 1948 amendment[17] which occurred as a direct response to this Court's decision in *Toucey v. New York Life Insurance Company,* 314 U.S. 118 (1947). This revision is generally recognized as an attempt to restore "the basic law as generally understood and interpreted prior to the *Toucey* decision." Revisers Note, H.R. Rep. No. 308, 80th Cong. First Sess. A181-182 (1947). The 1948 amendment then is no authority for the court's action in this case since the law prior to *Toucey* contains no precedent for an injunction in these circumstances.[18]

On each occasion this Court has interpreted the Anti-Injunction Statute it has strictly construed the statute and narrowly construed any exception. *Amalgamated Clothing Workers of America v. Richman Brothers,* 348 U.S. 511 (1954); *Mitchum v. Foster,* 407 U.S. 225 (1972); *Vendo Company v. Lektro-Vend Corporation,* 433 U.S. 623 (1977); *County of Imperial, California v. Munoz,* 449 U.S. 54 (1980). That construction recognizes the importance of the statute to our federal system.

---

[16] Revised Statutes of 1874, Ch. 12, §720, 18 Stat. 134.

[17] The Anti-Injunction Statute was recodified at that time as 28 USC §2283.

[18] The relitigation exception was said by Justice Reed in his dissent in *Toucey* to have been established by this Court decisions in *Looney v. Eastern Texas Railroad Company,* 247 U.S. 214 (1918), *Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 366, 367 (1921) and *Local Loan Company v. Hunt,* 292 U.S. 234 (1934). None of these cases allow an injunction of issues of law or fact other than those presented and decided in the earlier federal action.

Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) involved a factual situation remarkably similar to the case at bar. In *Atlantic Coast Line* the railroad sought an injunction in federal court against picketing at one of its switching yards. When the federal court denied the request the railroad immediately sought and obtained an injunction in state court against the picketing. Sometime later the union returned to federal court and obtained an injunction against the enforcement of the state court injunction. In enjoining the state court the federal court held that "the injunction of the state court, if allowed to continue in force, will effectively nullify this Court's findings and delineation of the rights of the parties." 398 U.S. at 292.

This Court reversed and held that the district court's injunction could not be based on a need to "protect or effectuate" the federal judgment because the question of the union's right to picket under state law had not been presented in that case. Since the courts in the case at bar held that the federal plaintiffs had an opportunity to present the State Action issues as pendent claims in the Federal Action a portion of this Court's opinion in *Atlantic Coast Line* is particularly relevant:

> While the railroad could probably have based its federal case on the pendent state law claims as well, *United Mine Workers v. Gibbs,* 388 U.S. 715, 16 L.Ed 2d 218, 86 S.Ct. 1130 (1966), it was free to restrain from doing so and leave the state law questions and the related issue concerning preclusion of state remedies by federal law to the state court.

Applying the rationale of *Atlantic Coast Line* to the case at bar makes clear that the injunction was improper. Like the railroad in *Atlantic Coast Line,* Petitioners presented questions of state law in the State Action which were not resolved in the Federal Action. The federal court merely determined that Bank's actions did not violate the BHCA. An injunction of the

state law issues was not necessary to "protect or effectuate" that judgment. Neither does the courts' determination that the state law claims could have been joined in the Federal Action authorize the injunction.[18]

The only justification Bank and Herbert suggest for an injunction of issues which were not but they contend "could have been" litigated is the concern voiced by Justice Reed in his dissent in *Toucey* that a failure to do so has the result:

> That a federal judgment entered perhaps after years of expense and money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is only the basis for a plea of *res judicata* which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication.

314 U.S. at 144, Reed, J. dissenting. This argument is weak at best since the preclusive effect of a judgment is routinely presented to the court in a subsequent proceeding and a court unfamiliar with the original proceeding normally decides that issue. The argument also impermissibly implies that the state court is an inadequate forum to consider the res judicata issue.[19]

---

[18] The courts' determination that Parsons-Mobile and Parsons could have joined all the claims in the Federal Action is highly questionable. At the time the Federal Action was filed those claims were already pending in state court. There was admittedly no independent basis of jurisdiction over Orange or OSI in the Federal Action. In addition, neither Bank and Herbert nor the courts below have suggested how Parsons-Mobile and Parsons could have joined the Trustee in the Federal Action. Since the question of pendent jurisdictoin is a part of the issue of the preclusive effect of the federal judgment which is properly presented only to the state court it will not be argued in this brief.

[19] The remedy at law available to Bank and Herbert is discussed at page 29 herein.

More importantly the balance of federalism which the Anti-injunction Statute protects cannot be tipped by consideration of mere convenience to parties.

This Court has articulated the narrow construction which must be given to any exception to the Anti-injunction Statute much more clearly than this writer ever could:

> This cautious approach is mandated by the "explicit wording of §2283" and the "fundamental principle of a duel system of courts." We have no occasion to construe this section more broadly:
>
> [It is] clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation. (citations omitted)

Vendo Company v. Lektro-Vend Corporation, 433 U.S. 623, 631 (1977). The courts below erred in expanding the relitigation exception to the Anti-Injunction Statute §2283. For that reason the injunction must be reversed.

B. Principles Of Comity And Federalism Prohibit An Injunction In This Case.

Assuming *arguendo* the district court had authority to enjoin the state court proceeding its injunction was nonetheless improper. The mere finding that a request for an injunction of a state court proceeding falls within one of the exceptions to the Anti-Injunction Statute does not end the court's inquiry. The Anti-Injunction Statute does not "qualify in any way the principles of equity, comity, and federalism as must [in its absence] restrain a federal court when asked to enjoin a state court proceeding. *Mitchum v. Foster,* 407 U.S. 225, 243 (1972).

In *Mitchum* this Court found that an injunction pursuant to 42 U.S.C. §1983 fell within the "expressly authorized by Congress" exception but remanded the case to the district court to determine whether or not principles of equity, comity and

federalism prohibited the court from exercising that authority. In the case at bar, Herbert and Bank have not suggested and neither court below has found any justification for the injunction beyond the determination that the Federal Action judgment barred the State Action. The mere decision that §1983 is an exception to the Anti-Injunction Statute is not alone sufficient to justify an injunction. Neither is the mere finding that a state action is barred by a federal judgment under principles of res judicata.

In applying principles of comity and federalism a district court should weigh the necessity of an injunction to "protect or effectuate" its earlier judgment against the extent of intrusion into the state court function. Where a state action could result in a judgment in direct conflict with an earlier federal judgment a significant intrusion into the state court function could perhaps be justified. *See, Bank of Heflin v. Miles,* 621 F.2d 108 (5th Cir. 1980). In the same manner an injunction might be justified where, although there is no direct conflict, relitigation of issues finally determined in an earlier federal proceeding is clear and the injunction is requested prior to expenditure of significant state judicial resources.

Petitioners submit that if principles of comity and federalism do not prohibit the injunction in this case no situation will arise where they will. No issue presented in the State Action was actually litigated in the Federal Action. A state court judgment finding Bank and Herbert guilty of fraud and commercially unreasonable behavior in violation of state law in no way nullified or undermined the earlier federal judgment that Bank did not violate the BHCA. In order to justify the injunction of an ongoing state proceeding the courts below found an implied exception to the Full Faith and Credit Act when none had been found before, expanded the relitigation exception to the Anti-Injunction Statute, allowed a non-party to the federal judgment (Herbert) to use that judgment to bar not only parties to it but other non-parties (Trustee), applied collateral estoppel to non-

parties to the Federal Action who admittedly had no authorized representative in that action and questionably applied a definition of res judicata[20] never accepted by this Court to bar what the district court recognized to be a separate cause of action.

It is impossible to reconcile the courts' actions with this Court's admonition that:

> [a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly manner to finally determine the contraversy.

Atlantic Coast Line, 398 U.S. at 297. The courts below resolved each doubt surrounding the propriety of the injunction in favor of intervening in a state court proceeding in which the state had invested substantial judicial resources. Principles of comity and federalism require that the injunction be reversed.

C. General Equitable Principles Prohibit An Injunction In This Case.

Even if their request for an injunction falls within an exception to the Anti-Injunction Statute and principles of comity and federalism do not bar it, Bank and Herbert must still demonstrate they are entitled to injunctive relief under general equitable principles. *Mitchum v. Foster,* 407 U.S. 225 (1972). Bank and Herbert recognized this requirement and allege they have no adequate remedy at law and irreparable harm (A. 7). They did not, however, introduce any evidence to support those allegations.

---

[20] The question of whether the courts below were correct in ultimately finding that the State Action was barred by the federal judgment under principles of res judicata and collateral estoppel is not presented to this Court. It is enough for purposes of this case that the question was sufficiently unclear that two state court judges heard Bank and Herbert's argument on the issue and rejected it. (A. 219-20).

Bank and Herbert have an adequate remedy at law. Their purported right to federal injunctive relief is premised on their contention that the federal judgment precludes the State Action under principles of res judicata. At the time this action was filed that issue was pending before the state court in Bank and Herbert's post judgment motions. Bank and Herbert can present their res judicata defense to state appellate courts and to this Court by Petition for Certiorari. There has been no allegation or finding that Bank and Herbert will not receive a fair adjudication of their res judicata defense in state court.

The only possible way to conclude that Bank and Herbert lack an adequate remedy at law is to hold that the Alabama appellate courts are inadequate to decide the res judicata issue. This Court has long recognized that in our federal system the state courts must be relied upon to enforce federal rights subject to review by this Court. The express restrictions on injunctions of state court proceedings are premised in part on the possibility that such injunctions can be readily interpreted "as reflecting negatively upon the state court's ability to enforce constitutional principles". *Huffman v. Pursue Limited,* 420 U.S. 592, 604 (1975).

The trial court did not discuss the question of the adequacy of Bank and Herbert's remedy at law. The Court of Appeals misconstrued the requirement of a lack of adequate remedy at law and stated: "no remedy at law exists to protect the Bank from having to pursue the State Action on appeal, just as no remedy at law exists to protect a party from having to relitigate an issue at trial." 747 F.2d at 1377, (Pet. Cert. A-17). Although presented in a slightly different context, this Court has held that "the 'cost, anxiety, and inconvenience of having to defend against a single criminal prosecution' was not the type of injury that could justify federal interference" into a state court proceeding. *Huffman v. Pursue Limited,* 420 U.S. at 602 quoting *Younger v. Harris,* 401 U.S. 37, 46 (1971). Any inconvenience

Bank might suffer in prosecuting an appeal to the Supreme Court of Alabama is not sufficient to make their remedy at law inadequate.

Bank and Herbert waived their right, if any, to seek an injunction of the state court proceeding. The trial court entered its judgment in the Federal Action in June, 1981. Bank and Herbert continued litigating in the State Action, asserted a counter-claim against Parsons and a cross-claim against Orange in the State Action and availed themselves of discovery to pursue those claims. Bank and Herbert presented their res judicata defense along with their defense on the merits to the state court. At the time the district court issued its injunction Bank and Herbert continued to assert their res judicata defense in state court in post-judgment motions.

The district court recognized that Bank and Herbert made a tactical decision to assert their res judicata defense in state court along with other affirmative defenses. (Pet. Cert. A-42). Perhaps Bank and Herbert wanted an opportunity for a jury to exonerate them of the allegations.[21] Perhaps they considered their other defenses stronger than their res judicata defense or felt that the state court plaintiffs could not meet the burden of proof. The district court held, as a matter of law, that the right to seek an injunction in these circumstances cannot be waived. "The public itself, as well as the parties, is interested in deterring relitigation of suits and no individual may waive the public interest." (Pet. Cert. A-42). The district court erred in failing to hold, based on the undisputed evidence that Bank and Herbert waived that right by presenting their case on the merits to the state court.

---

[21] As this Court is aware the jury in the Federal Action resolved all questions of fact against Bank apparently believing the testimony of Parsons and rejecting Herbert's.

Bank and Herbert's conduct estopped them from seeking the equitable remedy of an injunction for other reasons as well. Recognizing that Parsons-Montgomery's interests were asserted in the State Action Bank and Herbert sought to have the Trustee joined as an indispensable party. (A. 216). Bank never sought to join the Trustee in the Federal Action and for that reason are estopped from now asserting that the Trustee's interests were involved at all in that case. Bank argued, at every stage of the Federal Action, that the court there lacked jurisdiction of Plaintiffs' BHCA claim. For that reason Bank and Herbert are now estopped from arguing that the federal court had jurisdiction of Plaintiffs' state law claim as well.

Indeed, the state court's rejection of Bank's contention that the federal judgment precludes the State Action may well have been based on estoppel principles. Bank and Herbert never suggested to the federal or state court that they contended the two actions were based on the same claim.

> Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude plaintiff from proceeding and obtaining judgment in the other action. The failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the splitting of the claim.

Restatement (Second) of Judgments §26 page 235.

Because the courts below failed to apply general equitable principles to the undisputed evidence the injunction must be reversed.

III. A Litigant Is Not Bound By A Judgment To Which He Is Not A Party Where The Parties To That Judgment Had No Authority To Represent Him.

A. The Trustee In Bankruptcy Should Not Be Estopped From Litigating His State Court Claims When The Trustee In Bankruptcy Was Not In Privity Or Virtually Represented By The Plaintiffs In The Federal Action.

The court of appeals opinion represents the first time a court has found virtual representation in the absence of a finding that the party to be estopped expressly or impliedly authorized a party to represent him in prior litigation.[22] Under *res judicata,* a final judgment on the merits bars further claims by parties, or their privies, based on the same cause of action, and under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. These interests are similarly implicated when non-parties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved. Preclusion of such non-parties falls under the doctrine of collateral estoppel rather than res judicata because the latter doctrine presupposes identity between causes of action. The cause of action which a non-party has vicariously asserted differs by definition from that which he subsequently seeks to litigate in his own right. *Montana v. United States,* 440 U.S. 147, 154 (1979).

---

[22] See, *General Foods Corp. v. Massachusetts Department of Public Health,* 648 F.2d 784 (1st Cir. 1981); *Expert Electric, Inc. v. Levine,* 554 F.2d 1227 (2d Cir. 1977); *Charter Oak Fire Insurance Co. v. Sumitomo Marine Fire Insurance Co., Ltd.,* 750 F.2d 257 (3rd Cir. 1984); *Humphries v. Tann,* 487 F.2d 666 (6th Cir. 1977); *Del Mar Avionics v. Quinton Instruments Company,* 645 F.2d 832 (9th Cir. 1980).

The courts have had a difficult time in defining privity. Generally speaking, one whose interests were adequately represented by another vested with the authority of representation is bound by a judgment, although not formally a party to the litigation. *Expert Electric, Inc. v. Levine,* 554 F.2d 1227 (2nd Cir. 1977). It is unquestioned that the Plaintiffs in the Federal Action had no authority to represent the Trustee. The Federal Action was brought after Parsons-Montgomery was adjudicated bankrupt and the Trustee appointed. The Parsons and Parsons-Mobile did not attempt to represent Parsons-Montgomery; they sought only to recover damages they suffered separate and distinct from Parsons-Montgomery.

Furthermore, the different interests which the Trustee represented as compared to the Parsons and Parsons-Mobile were readily recognized by Judge Steele when he refused to appoint the attorney for Parsons and Parsons-Mobile as attorney for the Trustee, anticipating that "by virtue of his representation by Parsons Steel, Inc., a Mobile corporation, and Mr. Parsons individually, you may have some conflict of interest in the prosecution of a suit on behalf of the Trustee as well as in the prosecution of a suit (Federal Action) filed by Mr. Beasley on behalf of Parsons Steel, Inc., a Mobile corporation, Jim Parsons, individually against the same, or some of the same, defendants." (A. 293-94).

The sole beneficiaries from the Federal Action, had it been successful, would have been the stockholders of Parsons-Mobile and Parsons individually, certainly not the unsecured creditors of Parsons-Montgomery which the Trustee represents.

The district court and the court of appeals majority held that the damages caused by the "wrong" were the same in both the federal and state actions. However, the Federal Action was bifurcated by the district court with the liability issues being litigated first. Because the district court granted judgment n.o.v. in favor of the Bank, the issue of damages was never litigated.

The court of appeals, citing Wright, Miller & Cooper, Federal Practice and Procedure § 318 (1981) but no case law, stated that:"A finding of privity is no more than a finding that all the facts and circumstances justify a conclusion that non-party preclusion is proper."[23] Trustee contends that the district court was clearly erroneous in finding privity based on the facts in this particular case. Other cases from the First Circuit, Second Circuit, Third Circuit, Sixth Circuit, and Ninth Circuit have held that in order for non-parties to prior litigation to be in privity, the parties to prior litigation must have had implied or express authority to represent the parties now to be bound. There was not one shred of evidence that the Plaintiffs in the Federal Action had any authority, implied or express, to represent the Trustee.

Charter Oak Fire Insurance Company v. Sumitomo Marine Fire Insurance Company Ltd., 750 F.2d 257 (3rd Cir. 1984), held that an insurance company who had controlled litigation in the first action but was not a party to the first action was precluded from bringing a second action asserting the same claim for indemnity. Citing *Montana v. United States, supra,* the court said that the law has developed the doctrines of collateral estoppel and res judicata in order to

> protect...adversaries from the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions. These interests are implicated when, as in this case, *non-parties control the litigation in the first action* and *then sue in their own right in the second.* (emphasis added)

---

[23] *Parsons Steel, Inc. v. First Alabama Bank of Montgomery,* 747 F.2d 1367, 1380 (11th Cir. 1984).

The key to the *Charter Oak* decision was that Charter Oaks controlled the litigation in the state court, and then asserted the same claim for indemnity on which it had been unsuccessful in state court in a second federal action. The conduct complained of was the same in both cases "failure to indemnify and pay cost of defense". The court said that the Charter Oaks participation in the state court litigation clearly rose to the level of control necessary to apply preclusion rules, citing *Ransberry Corporation v. Automatic Finishing Systems, Inc.*, 412 F.Supp. 1357, 1363-64 (E.D.Pa. 1976) (where the non-party actively and avowedly conducts the defense, manages and directs the trial at its expense and under its supervision, the outcome, which if favorable, would have redounded to his benefit, if adverse become sauce for the goose and gander alike and binding upon principles of res judicata) as authority.

Del Mar Avionics v. Quinton Instruments, 645 F.2d 832 (9th Cir. 1980) illustrates some factors which should be used by courts to determine whether a party had control of prior litigation, thus putting it in privity with a prior party to justify subsequent preclusion: whether the subsequent party (1) selected and paid counsel; (2) paid litigation expenses; (3) entered into a written indemnification agreement; (4) participated in settlement negotiations; (5) had control over the decision to appeal. Id. at 835.

The Bank moved to join the Trustee in the State Action. (A. 214). The Bank argued to the district court and court of appeals that the Trustee would have been the one to benefit from a favorable decision in the Federal Action; thus it should have been a party or litigated its claims in the Federal Action. The Bank, on several occasions in the Federal Action, asserted that Parsons-Mobile and the Parsons were not the proper parties before the court raising an issue of the standing of Parsons-Mobile and Parsons. The court rejected the Bank's contention in the Federal Action and ruled that Parsons-Mobile was the proper party. If Parsons-Montgomery (the Trustee) had been

the real party in interest or had been the one to benefit in the Federal Action, why did the Bank not move to join the Trustee in the Federal Action?

No claims were made on behalf of the bankrupt corporation in the Federal Action, and there was no reason for the Trustee to intervene. There is simply no evidence in the record to support the Bank and Herbert's contention that the Trustee made a conscious decision to refrain from joining the Federal Action. The Federal Action was based on a very narrow issue under the BHCA; basically whether the Bank had conditioned an extension of credit upon a requirement of a change in management and ownership in violation of the BHCA, 12 U.S.C. §§1971, et seq. The district court recognized that Parsons-Montgomery had no interest in the Federal Action by continually denying the Bank's motions raising the issue of Parsons and Parsons-Mobile standing. The same district court, paradoxically held in the instant case that "viewing barebone, though complicated, pleadings in retrospect" that Parsons-Montgomery was the primary party damaged by any alleged violation of the BHCA. (Pet. Cert. A-40, 41).

While it is clear that whether a non-party controlled the earlier litigation is a question of fact for the trial court, the district court and the court of appeals in the case at bar failed to utilize any factors found in extant legal precedents which would resolve this issue and merely stated in conclusory terms that the Trustee was in privity with the Parsons as to all the claims that were or should have been raised in the Federal Action.

Relying on established legal precedent, the Trustee asserts that control over prior litigation is essential to finding that privity existed. Trustee's interests were not adequately represented in the Federal Action. The unsecured creditors of the bankrupt corporation (Parsons-Montgomery) certainly were not adequately represented by Plaintiffs in the Federal Action..

Delta Airlines, Inc. v. McCoy Restaurants, Inc., 708 F.2d 585 (5th Cir. 1983), held that the principle of virtual representation applies only "when the respective interests are closely aligned and the party at trial adequately represented those interests". Trustee's interests were neither closely aligned nor adequately represented by the parties to the Federal Action.

Another factor that was overlooked, ignored and glossed over by the court of appeals is the circumstances of the bankruptcy of the subsidiary corporation causing a profound alteration in the relationship between the stockholder/parent corporation and the subsidiary corporation. A trustee in bankruptcy is charged with specific duties, obligations, and responsibilities with respect to the estate. The interests of the stockholders of the bankrupt corporation are subrogated and often antagonistic to the interests of the creditors. Consequently, the relationship between the parent and subsidiary corporations (or a sole stockholder and his/her corporation) which might normally give rise to privity must be closely re-examined with the advent of intervening bankruptcy.

As erroneously noted by the court of appeals, the Federal Action was not pending in federal court when Parsons-Montgomery was adjudicated a bankrupt and a trustee appointed. (A. 292). Parsons-Mobile and the Parsons brought the Federal Action after Parsons-Montgomery had been adjudicated a bankrupt without consulting Trustee.

To further highlight the antagonistic or different interests the Trustee had to Parsons-Mobile and the Parsons, Trustee had sued Parsons and Parsons-Mobile for fraudulent conveyances in the bankruptcy court (A. 298-303). This was not mentioned by either the district court or the court of appeals, and this fact, alone, should weigh heavily in determining whether the Trustee was in privity with and adequately represented by the Parsons and Parsons-Mobile in the Federal Action case.

Once a corporation has been adjudicated a bankrupt and a trustee appointed, influence over the affairs of the debtor corporation by the officers and directors of that corporation become virtually non-existent. All powers, control, and function of the corporation vests with the trustee. *See,* Colliers on Bankruptcy, Vol. 4, §704 (15th ed. 1985).

Without any basis in fact, the Respondents in their previous briefs, the district court in its decision, and the court of appeals have all asserted that the Trustee's interests were adequately represented in the Federal Action. However, as one looks at the bankruptcy laws, such a holding is inconceivable. If the Plaintiffs in the Federal Action had recovered a judgment against Bank, the Trustee would not have been entitled to one cent. "The Trustee takes no title to property not belonging to the bankrupt except as permitted by the explicit provisions of the Act". Colliers on Bankruptcy, Vol. 4(A), §70.01 p. 84 (14th ed. 1983). *See also Matter of Jacoby,* 138 F.2d 42 (3d Cir. 1943).

As concerns collateral estoppel, the *Restatement (Second) Judgments,* §59(3)(b) (1982) highlights the unique position of the Trustee. "The judgment in an action by or against the holder of ownership in the corporation is conclusive upon the corporation except when relitigation of the issue is justified in order to protect the interest of another owner or creditor of the corporation." The comments to § 59 further underscore this distinction. "The rule of issue preclusion (collateral estoppel) should not be applied in such circumstances, or where its application would unfairly affect another person associated with the corporation, or third persons, *such as creditors,* or where the interests of the corporation and its owners were in such potential conflict with regard to the issue that it would be unfair to give preclusive effect to the prior determination." (Parenthetical expression and emphasis added). Comment (e) at 100.

B. The Decision Below Deprived The Trustee Of A Full And Fair Opportunity To Litigate His Claims In Violation Of The Requirements Of Due Process.

The longstanding general rule of collateral estoppel is that it may not be asserted against a person not a party or in privity with a party to the prior action. *Hansberry v. Lee,* 311 U.S. 32, 40, (1940). This principle was reaffirmed in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313 (1971), where this court stated:

> Some litigants — those who never appeared in a prior action — may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stands squarely against their position.

Ibid at 329.

This Court, in *Allen v. McCurry,* 449 U.S. 90 (1980), while affirming the underlying policies supporting issue preclusion, retained the one general limitation the Court has repeatedly recognized: "[T]he concept of issue preclusion cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity to litigate' that issue in the earlier case." 449 U.S. at 96.

It is always a prerequisite to the invocation of collateral estoppel that the issue determined in the prior action be identical to the issue in the litigation that is sought to be estopped. In cases involving estoppel of non-parties, this is particularly important. Note, *"Collateral Estoppel of Non-Parties",* Harvard Law Review, Vol. 87:1485, (1974).

> "In determining whether a non-party's interest in litigating an issue is identical to one litigated in a previous action, the crucial element is the extent to which the non-

> party may be thought to have had a vicarious day in court. Two aspects of this question can be identified. First, to what extent did the non-party participate in or control the prior litigation; second, to what extent can the issue be said to have been fully and fairly litigated in the first action in a manner which protects the interest of the non-party." *Ibid* at 1500.

This Court, in *Hansberry v. Lee,* 311 U.S. 32, 42 (1940), reasoned that the due process requirement of adequate representation was not satisfied unless the interests of the non-party were substantially similar to the interests of the parties to the prior action. The district court and the court of appeals, by erroneously finding the interests of the Trustee were the same as the Parsons and Parsons-Mobile in the Federal Action, have denied the Trustee his right to litigate. Trustee has been denied due process.

Absent privity, relitigation of identical issues by persons who did not participate in the prior proceeding is allowed. The underlying rationale for this is that the parties seeking relief did not receive fair representation in the earlier suit because of the diverse nature of the interests involved in the various stages of litigation; consequently, the constitutional requirement of due process mandates relitigation.[24] Cordell, *"The Expanding Scope of the Res Judicata Bar",* 54 Texas L.Rev. 527 at 529 (1976).

Support for the Trustee's position that he did not have a full and fair opportunity to litigate his case in the Federal Action can be found in the case of *Nevada v. United States,* 462 U.S. 1104 (1983).

---

[24] Since no identical issue actually litigated in the Federal Action was repeated in the State Action this Court need never reach the question of whether or not the Trustee had a full and fair opportunity to litigate his case in the Federal Action. See pages 19 - 21 of this brief.

This Court in *Nevada* drew the distinction between the "fastidious standards of a private fiduciary who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent and where Congress has decreed that the Government must represent more than one interest". *Ibid* at 528. This Court noted that the Government was not in the position of a private litigant or private party under traditional rules of common law or statute. Parsons and Parsons-Mobile had no authority to represent the Trustee in the Federal Action. Trustee contends that the issues litigated in the Federal Action were very different from those found in the state action but even if they were the same, Trustee insists the privity requirements necessary to preclude Trustee cannot be found. The Parsons and Parsons-Mobile interests were in conflict with those of the Trustee. This Court in *Nevada* seemed to intimate that in situations involving private litigants a party in the position of trustee would not be precluded from litigating a second action involving the same issues. There would be no privity as to preclude a party such as trustee when the persons supposedly "vicariously represented" were represented by parties who had a conflict of interest with those persons represented.

In *Montana v. United States,* 440 U.S. 147 (1979), this Court held that under the doctrine of collateral estoppel, the United States was precluded from challenging in federal court the constitutionality of the Montana gross receipts tax upon contractors of public but not private construction projects since (1) the United States, although not a party to the state court litigation in which the constitutionality of the tax had been upheld, had exercised control over that litigation by directing and financing it and filing an amicus brief and, (2) the constitutional question expressly and definitely presented in the federal court action was the same as the action litigated and adjudged adverse to the Government in the state action. This Court stated that the Government had a sufficient "laboring oar" in the state court litigation, and there were no special circumstances justifying an

exception in the general principle of estoppel. Again, this Court's decision turned on control of the prior state action and involvement by the United States in that state court action. In the instant case, the trustee played no role in the decision to file the Federal Action, could have had no control if he had wanted to, did not participate in any manner in that action, and contributed nothing toward the plaintiff's attorney fees or expenses. Trustee did not participate because there was no interest involving the Trustee.

The district court and the court of appeals relied heavily on the case of *Woods Exploration and Producing Company v. Aluminum Company of America,* 438 F.2d 1286 (5th Cir. 1971) to support the decision that "recovery in the Federal Action would have compensated Plaintiffs (including the Trustee) for the total harm suffered and the Plaintiffs were afforded an opportunity to allege state grounds which constituted the same cause of action as the federal proceeds" (parenthetical expression added). The case at bar can easily be distinguished from *Woods.* The Bank and parties attempting to invoke collateral estoppel against Trustee focus their arguments on the cost to be incurred by them if estoppel is not allowed. Significantly, the costs of nine days of state court trial have already been incurred by all parties. "The relation of rules of practice to the work of justice is intended to be that of a handmaid rather than a mistress, and a court ought not to be so far bound and led by rules ... as to be compelled to do what will cause injustice in the particular case." Clark, *"The Handmaid of Justice",* 23 Wash. U.L.Q. 297 (1938).

The case at bar is an extraordinary case with unusual circumstances. The complaint in the Federal Action alleged violations of the BHCA. Plaintiffs' contentions were outlined in the pre-trial order as follows:

> "by placing certain requirements on Plaintiffs, the Defendants customers, as conditions to making additional loans and extending credit to Parsons Steel Industries, Inc.

> These conditions were not of such a nature as to be usually provided to a bank by a customer in connection with a loan. The specific conditions placed on the Plaintiffs consisted of requiring (1) a change in the management of Parsons Steel Industries, Inc. and (2) the sale or agreement to sell a minority of the capital stock of said corporation to Michael Orange, a third party secured by the Defendant and unknown to the Plaintiffs."

(A. 280). Herbert, Orange and OSI were not parties to the Federal Action.

The pre-trial order in the Federal Action gave no clue to the Trustee that his interests were at stake in the Federal Action, and the district court recognized at that time that the Trustee had no interest which was to be protected in the Federal Action. The Trustee asserts that Bank recognized that the Federal Action and the State Action involved different parties and different issues. The principal rights and duties of the Bank to the three Plaintiffs in the Federal Action according to the pre-trial order involved only those rights and duties specified under the BHCA. 12 U.S.C. § 1971, et seq.

The principle test for determining whether the causes of action are separate is whether the principle rights and/or wrongs are the same in each case. *Ray v. Tennessee Valley Authority,* 677 F.2d 818, 821 (11th Cir. 1982). The wrongs alleged in the State Action involve (1) fraud by all defendants and the failure to act in good faith with respect to Parsons-Montgomery (Count I of Plaintiffs' Complaint A. 44); (2) the breach of responsibility to safeguard the interest of Parsons-Montgomery (Count II A. 54); conversion by Orange and OSI, of Parsons-Montgomery's assets (Count IV A. 55); wrongful detention by Orange and OSI of Parsons-Montgomery's assets (Count V A. 56); conversion by Bank and Herbert of the Parsons-Montgomery's assets (Count VI at A. 33); fraudulent conspiracy by all Defendants resulting in fraud against the

unsecured creditors and the wrongfully secret conversion of all Defendants of the assets of Parsons-Montgomery (Count VIII at A. 34); the sale of all of the assets of Parsons-Montgomery by Bank in a commercially unreasonable manner in that the assets were sold to OSI at private sale at a price predetermined by the Bank and OSI with no regard to the actual value of the assets (Count IX A. 26); breach of contract and promissory note against Orange and OSI (Count X A. 27); conversion of a life insurance policy owned by Parsons-Montgomery (Count XI A. 28). Parsons-Montgomery also sought an accounting from the Defendants (Count III A. 55) and to overturn the sale to OSI.

In contrast to the Federal Action, the causes of action of the Trustee in the State Action sounded in fraud not only against the Bank but also Orange, OSI and Herbert. The Trustee had additional claims against the Bank and OSI for violation of Alabama's version of the Uniform Commercial Code, particularly Code of Alabama §7-9-504 and §7-9-507, for a commercially unreasonable sale. No allegations of violation of the BHCA were made by Trustee against the Bank. Although some of the same or similar facts were alleged in the two complaints, there can be no doubt that the Trustee's causes in the state court case were different and distinct from those asserted by the three plaintiffs in the BHCA action.

The Bank's position, adopted by the district court and court of appeals, is that res judicata or collateral estoppel would preclude a party from raising a claim or issue in subsequent litigation simply because that party could have raised the claim or issue under the liberal joinder rules of the Federal Rules of Civil Procedure. Collateral estoppel will bar an issue *only* if that issue was a necessary, and not incidental or collateral, part of the same cause of action that was asserted in the prior litigation. The Eleventh Circuit, in affirming the district court's judgment n.o.v. in the Federal Action, simply found that the facts alleged did not constitute a tying arrangement prohibited by the BHCA. 1B Moore's Federal Practice states the Trustee's position as follows at paragraph 0.443[5.1]:

> Even though an issue was raised and fully litigated in a prior action, a finding on the issue was made by the court preliminarily to rendition of judgment, *the issue is not concluded by the resulting judgment unless a finding made on the issue was, at least alternatively, necessary to the judgment rendered. Thus, an incidental or collateral determination of an issue that was not material in the prior action does not foreclose reconsideration of that issue in later litigation in which the issue is material.* (emphasis added)

In the case at bar, the plaintiffs to the Federal Action had no authority to represent, and did not attempt to represent, Parsons-Montgomery. Although the Bank on several occasions argued that the Federal Action Plaintiffs had suffered no damages separate from the bankrupt corporation (Parsons-Montgomery), and, therefore had no standing to bring that action in the district court, the district court rejected that argument time and time again. Since no claims were made on behalf of the bankrupt corporation in the federal action, there was no reason for the Trustee to intervene. The Trustee in this case has been denied due process of law. His only chance to present evidence and arguments on his claim occurred in the State Action. The State Action is the only forum where the Trustee had an opportunity to "fully and fairly" litigate his claims.

CONCLUSION

The decision below constitutes an intrusion into the state court function greater than this Court has ever allowed. In order to justify the injunction of an ongoing state court proceeding the courts below found an implied exception to the Full Faith and Credit Act where none had been found before, expanded the relitigation exception to the Anti-Injunction Statute, allowed a non-party to the federal judgment to use that judgment to bar not only parties to it but other non-parties as well, applied collateral estoppel to non-parties who admittedly had no authorized representative in the prior action and ques-

tionably applied a definition of res judicata never accepted by this Court to bar what the district court recognized to be a separate cause of action. The courts erred, not only in their ultimate conclusion, but in each of the steps taken to reach that conclusion.

Since the founding of this country ours has been a system of independent, equal, co-existing court systems. Because the injunction in this case destroys the balance between those two systems it must be reversed. Petitioners respectfully request that this Court reverse the injunction and remand this case with instructions that it be dismissed with prejudice.

Respectfully submitted,

FRANK M. WILSON
BEASLEY AND WILSON
418 South Hull Street
Montgomery, Alabama 36104
(205) 269-2343

Counsel of Record for Petitioners, Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons

*JAMES JERRY WOOD
JAMES T. SASSER
WOOD AND PARNELL
641 S. Lawrence Street
Montgomery, Alabama 36101
(205) 832-4202

Counsel of Record for Petitioner, A. Pope Gordon, Trustee in Bankruptcy for the Estate of Par - sons Steel Industries, Inc.

APPENDIX

APPENDIX A

Date	Forum	Action Taken
2/15/79	State Circuit Court Montgomery County, Alabama	Complaint filed in State Circuit Court on behalf of Parsons Steel Industries, Inc., Jim Parsons, Melba Parsons and Parsons-Mobile against Bank, Herbert, Orange and OSI, Inc.
4/5/79	U.S. Bankruptcy Court, Middle District of Alabama, Northern Division	Parsons Steel Industries, (Parsons-Montgomery) adjudicated involuntary bankrupt
5/30/79	U.S. District Court, Middle District of Alabama, Northern Division	Complaint filed by Jim Parsons, Melba Parsons and Parsons-Mobile against Bank and Herbert alleging violations of Federal Bank Holding Company Act
6/17/81	State Circuit Court Montgomery County, Alabama	Bank and Herbert's motion to join Trustee as an indispensable party in the State Action
6/17/81	U.S. District Court, Middle District of Alabama, Northern Division	Order in Federal Court case granting Bank's motion for n.o.v.

6/11/82	State Circuit Court Montgomery County, Alabama	Trustee's Amendment to Complaint in State Action alleging commercially unreasonable behavior in sale of assets by Bank and Herbert
1/6/83	State Circuit Court Montgomery County, Alabama	Second state court judge denies Bank and Herbert's motion for summary judgment on res judicata principles
1/31/83	State Circuit Court Montgomery County, Alabama	Trial begins in State Action
2/9/83	State Circuit Court Montgomery County, Alabama	Verdict rendered against Bank and Herbert
2/24/83	State Circuit Court Montgomery County, Alabama	Motions for new trial or in the alternative judgment n.o.v. filed by Bank and Herbert
3/7/83	U.S. District Court, Middle District of Alabama, Northern Division	Complaint and Request for Preliminary and Permanent Injunction filed by Bank and Herbert

Supreme Court, U.S.
FILED
AUG 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1616

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PARSONS STEEL, INC., JIM D. PARSONS, MELBA L. PARSONS; and TOM MCGREGOR, Trustee in Bankruptcy for the Estate of PARSONS STEEL INDUSTRIES, INC.,

Petitioners,

VS.

FIRST ALABAMA BANK OF MONTGOMERY, N. A., and EDWARD HERBERT,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS

M. ROLAND NACHMAN, JR.
(Counsel of Record)
JAMES A. BYRAM, JR.
STEINER, CRUM & BAKER
P. O. Box 668
Montgomery, Alabama 36101
(205) 832-8800

Attorneys for Respondents

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Did the court below correctly affirm a district court injunction staying proceedings in a state court action in the following circumstances:

The district court found that an action there under the Bank Holding Company Act (12 U.S.C. § 1972) and a state court action were based on the same factual allegations and substantially the same damages claim. After a federal judgment in favor of respondents, petitioners sought to relitigate substantially identical matters in the state action. Because the state judgment in effect nullified the earlier federal one, the district court, pursuant to 28 U.S.C. § 2283, enjoined further prosecution of the state court action in order to protect and effectuate its prior judgment.*

2. Did the court below correctly affirm the district court's inclusion in the scope of this injunction of a state court party—by choice not a party to the federal action—upon a factual finding of privity and adequate representation?

---

* Petitioners do not present for review the federal question "of whether the courts below were correct in ultimately finding that the State Action was barred by the federal judgment under principles of res judicata and collateral estoppel..." (Bf., p. 28, n.20)

List of Parties: Parsons Steel, Inc.; Parsons Steel Industries, Inc., and Tom McGregor, as its Trustee in Bankruptcy; James D. Parsons; Melba Parsons; First Alabama Bank of Montgomery, N.A., a national banking association, substantially all of the stock of which is owned by First Alabama Bancshares, Inc., a registered bank holding company; and Edward Herbert, formerly an officer of this Bank.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	iii
Table of Authorities	iv
Opinion Below	1
Statutes and Constitutional Provisions Involved	2
Statement of the Case	2
Summary of Argument	15
Argument	18
Epilogue	39
Conclusion	40
Certificate of Service	41
Appendix	A-1

TABLE OF AUTHORITIES

Cases:

A.C.L.R. Co. v. Brotherhood, 398 U.S. 281 ..... 20, 23

Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975), *cert. denied,* 423 U.S. 908 ..... 24, 37

Allied Mutual Ins. Co. v. Roberson, 306 F.2d 130 (4th Cir. 1962) 24

Baltimore S. S. Co. v. Phillips, 274 U.S. 316 30

Bank of Heflin v. Miles, 621 F.2d 108 (5th Cir. 1980) ... 24

Blonder-Tongue Labs. v. Univ. of Illinois Found., 402 U.S. 313 19

Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) ... 19

Brady v. So. R. Co., 320 U.S. 476 19

Brown v. McCormick, 608 F.2d 410 (10th Cir. 1979) ... 24, 27

California v. Taylor, 353 U.S. 553, 557, n.2 34

Capital Cities Cables v. Crisp, 467 U.S. ____, 81 L.Ed. 2d 580 34

Clark v. United Bank of Denver, 480 F.2d 235 (10th Cir. 1973), *cert. denied,* 414 U.S. 1004 34

Donelon v. New Orleans Terminal Co., 474 F.2d 1108 (5th Cir. 1973), *cert. denied,* 414 U.S. 855 ..... 22, 24, 40

Duryea v. Third Northwestern Nat'l Bank, 606 F.2d 823 (8th Cir. 1979) 34

Ermentrout v. Commonwealth Oil Co., 220 F.2d 527 (5th Cir. 1955) 28

First Alabama Bank of Montgomery, N.A., et al. v. Parsons Steel, Inc., et al., 747 F.2d 1367 (11th Cir. 1984) ..... *passim*

General Foods v. Mass. Dept. of Health, 648 F.2d 784, 787 (1st Cir. 1981) 17, 34, 39

Harper Plastics v. Amoco Chemicals Corp., 657 F.2d 939 (7th Cir. 1981) 24, 32, 33

Healy v. Penn. R. Co., 181 F.2d 934 (3rd Cir. 1950) 27

Hill v. Martin, 296 U.S. 393 ..... 16, 27

In re Corrugated Container Antitrust Litigation, 659 F.2d 1332 (5th Cir. 1981), *cert. denied,* 456 U.S. 756 24

In re Four Corners Enterprises, 17 B.R. 156 (M.D. Tenn. 1982) 35, 36

Johnson v. Brown Service Ins. Co., 293 Ala. 549, 307 So.2d 518 28

Kreager v. General Electric, 497 F.2d 468 (2nd Cir. 1974), *cert. denied,* 419 U.S. 61 37

Leishman v. Assoc. Wholesale Electric, 318 U.S. 203 ... 27

Marrese v. American Academy of Orthopaedic Surgeons, ____ U.S. ____, 53 U.S.L.W. 4265 26

Meridian Investing Development Corp. v. Suncoast Highland Corp., 628 F.2d 370 (5th Cir. 1980) 24

Mitchum v. Foster, 407 U.S. 225 ..... 16, 20, 23, 25

Montana v. United States, 440 U.S. 147 ..... 17, 34

Nevada v. United States, 462 U.S. 1104, 77 L.Ed.2d 509 ..... 8, 17, 19, 29, 36

Nilsen v. City of Moss Point, 701 F.2d 556 (5th Cir. 1983) 29

Paradise v. Vogtlandische Maschinen-Fabrik, 99 F.2d 53 (3rd Cir. 1939) 35

Parklane Hosiery Co. v. Shore, 439 U.S. 322 19

Parsons Steel, et al. v. First Alabama Bank of Montgomery, et al., 679 F.2d 242 (11th Cir. 1982) ... 5, 8, 9, 13, 19, 28

Rooker v. Fidelity Trust, 263 U.S. 413 20

Scott v. Lane, 414 So.2d 939 (Ala. 1982) 27

Seaboard Coast Line R. Co. v. Union Camp Corp., 613 F.2d 604 (5th Cir. 1980), *cert. denied,* 449 U.S. 835 24

Silcox v. United Trucking Service, 687 F.2d 848 (6th Cir. 1982) 24, 27

Southwest Airlines Co. v. Texas International Airlines, Inc., 546 F.2d 84 (5th Cir. 1977), *cert. denied,* 434 U.S. 832 ..... 24, 36

Tennessee v. Dunlap, 426 U.S. 312, 314, n.2 34

Tose v. First Penn. Bank, 648 F.2d 879 (3rd Cir. 1981), *cert. denied,* 454 U.S. 893 34

Toucey v. New York Life, 314 U.S. 118 ..... 16, 18, 20, 24, 25

United States v. District of Columbia, 654 F.2d 802 (D.C. Cir. 1981), *cert. denied,* 454 U.S. 1082 24

United States v. Amer. Society of Composers etc., 442 F.2d 601 (2nd Cir. 1971) 24

Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 630 et. seq. 16, 23

Wood v. Santa Barbara Chamber of Commerce, 705 F.2d 1515 (9th Cir. 1983), *cert. denied,* 104 S.Ct. 1446 24

Woods Exploration & Pro. Co. v. Aluminum Co. of Amer., 438 F.2d 1286, *cert. denied,* 404 U.S. 1047 22,24,31

Constitution and Statutes

Constitution of the United States, Fifth Amendment ... 2, 34

12 U.S.C. § 1972 - 75 ..... i, 5, 30

28 U.S.C. § 1738 ..... 2, 16, 25

28 U.S.C. § 2283 ..... *passim*

29 U.S.C. § 101 23

42 U.S.C. § 1983 25

Miscellaneous

Moore's Commentary on the United States Judicial Code, § 0.03(49), p. 410 21

9 *Moore's Federal Practice,* § 110.08[3] 27

Note, *Federal Power to Enjoin State Court Proceedings,* 74 Harv. L. Rev. 726 22

Redish, *The Anti-Injunction Statute Reconsidered,* 44 U. of Chicago L. Rev. 717 (1977) 21

A.L.I., *Study of the Division of Jurisdiction Between State and Federal Courts,* § 1372, p. 306 (1968).... 21

Restatement of Judgments, 2nd, §§ 24, 26 & 87 ... 8, 26, 27, 29

Rule 52(a) F.R.C.P..... 2

No. 84-1616

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PARSONS STEEL, INC., JIM D. PARSONS, MELBA L. PARSONS; and TOM MCGREGOR, Trustee in Bankruptcy for the Estate of PARSONS STEEL INDUSTRIES, INC.,

Petitioners,

vs.

FIRST ALABAMA BANK OF MONTGOMERY, N. A., and EDWARD HERBERT,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 747 F.2d 1367 (11th Cir. 1984). It appears as Appendix A to the petition. The opinion of the United States District Court for the Middle District of Alabama ("District Court") of June 15, 1983 appears as Appendix B to the petition; the opinion of the District Court of March 29, 1985 (JA-344) appears as an appendix to respondents' brief in opposition; and the order of the District Court of May 21, 1985 is at JA-354.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Relevant provisions of 28 U.S.C. § 2283 and § 1738 are contained in Petitioners' brief. The relevant portion of Rule 52(a) F.R.C.P. is also involved.[1]

STATEMENT OF THE CASE

Course of Proceedings and Disposition Below

On March 7, 1983 respondents ("Bank") brought an action in the district court under 28 U.S.C. § 2283[2] seeking an injunction against further proceedings in an Alabama state court action ("State Action")[3] as necessary "to protect or effectuate" the district court's earlier judgment of June 17, 1981 in a federal action (JA 72-88) ("Federal Action")—affirmed, sub nom. *Parsons Steel, Inc. v. First Alabama Bank of Montgomery, N.A.*, 679 F.2d 242 (11 Cir. 1982; JA 89-95).

After hearing, the district court on June 15, 1983 enjoined petitioners (plaintiffs in State Action) from its further prosecution:

---

[1] "...Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses...."

[2] "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment."

[3] That State Action had by then proceeded to verdict and judgment against Bank and Herbert in the amount of $4,000,001 and was then pending there on post trial motions for judgment n.o.v. and alternatively for a new trial.

> "This Court is of the opinion (1) that the State Circuit Court, in trying an identical set of facts to those previously tried in this Court, has disregarded, and is disregarding, the final judgment of this Court over timely filed defenses of res judicata and collateral estoppel; (2) that, when those defenses were filed, the complicated pleadings obscured the similarity of proceedings and privy of parties from a State trial court unfamiliar with the prior litigation in this Court; and (3) that to allow a continuation of the State court proceedings in another State court would simply complicate the wrong."[4]

The district court held that a fourth state plaintiff, the petitioner Trustee in bankruptcy of Parsons Steel Industries,[5] though not a party to the earlier Federal Action, was barred by the doctrines of res judicata and collateral estoppel "from relitigation by a judgment in a case wherein he should and could have been made a party to assert the trustee's rights but elected not to do so." (A-40 of petition.)

The court below approved the district court's findings[6] and affirmed this judgment and order of injunction; but remanded

---

[4] A. 42 of petition.

[5] Referred to as Parsons-Montgomery or "Subsidiary," a wholly owned subsidiary of one of petitioners, Parsons Steel, Inc., which was in turn co-owned by petitioners Melba and Jim Parsons. See 679 F.2d at 244; JA 89-90.

[6] 747 F.2d at 1370; A-5 of petition.

> "In a well-reasoned opinion, the federal district court found that the federal BHCA action and the state action were based on the same factual allegations and the damages claimed in each suit were substantially the same. The district court held that any additional state claims relating to the fact situation could have, and should have been raised in federal court under the doctrine of pendent jurisdiction. The BHCA action was therefore res

the case "for the narrow purpose of determining whether the Trustee should be barred from bringing his UCC action against the bank.'"

On March 29, 1985, after considering evidence of the parties, the district court declined to modify its injunction; and on May 21, 1985 denied Trustee's motion to reconsider. (J.A. 344-356)

On June 24, 1985 this Court granted review on certiorari.

Statement of The Facts[6]

This case involves two separate lawsuits stemming from a series of bank transactions involving Bank, the individual Parsons, the parent corporation Parsons Steel, Inc. (Parsons-Mobile), its subsidiary, Parsons Steel Industries, Inc. (Parsons-

---

judicata as to the state action. Because the state court judgment in effect nullified the federal court judgment in favor of the Bank, the federal court, pursuant to 28 U.S.C. § 2283, enjoined further prosecution of the state court action in order to protect or effectuate its prior judgment." (Footnote omitted.)

[7] 747 F.2d at 1381, n. 16; A-26. The court below held that there should be no modification in the following circumstances (747 F.2d at 1380; A 24-25)

> "If the UCC claim merely alleges that improprieties involving the Bank and Michael Orange prior to the sale resulted in the receipt of an unfairly low price for the company's assets, then the district court was correct in finding privity and barring the Trustee from asserting the UCC claim in state court. The Bank has already been required to defend its relationship with Michael Orange and OSI, Inc. and its role in the events leading up to the sale. These are the facts underlying the BHCA and fraud claims. The Trustee is in privity with the Parsons as to the adjudication of these facts and is bound by the federal adjudication of these matters."

All appendix citations of this opinion, e.g. "A-" hereafter refer to the petition.

[8] The majority opinion of the Court of Appeals below, 747 F.2d 1367 states fully the essential facts of this case.

Montgomery) and the Trustee in bankruptcy for Parsons-Montgomery.[9]

On February 15, 1979 the Parsons corporations and the two Parsons filed State Action against Bank and Herbert, its chief loan officer. The complaint generally averred fraud in connection with an alleged requirement by Bank that Parsons-Montgomery change its management and ownership as a condition for further loans; a promise of unlimited loans if such change was made; a failure to make such loans after such change; and alleged violations of Alabama law in connection with the foreclosure, repossession and sale of assets of Parsons-Montgomery. (JA 26-56)

On May 30, 1979 Parsons-Mobile and the two individual Parsons brought Federal Action—summarized by the court of appeals in that action (679 F.2d 242 at 244-246; JA 89-90 and 94):

> "The issue in this case is whether a bank is prohibited under the 1970 amendments to the Bank Holding Company Act, 12 U.S.C. §§ 1972-75 (1976), from conditioning additional credit on a change of corporate management and majority stock ownership. Parsons Steel, Inc. of Montgomery was a wholly owned subsidiary of the plaintiff company, Parsons Steel, Inc. of Mobile, owned by co-plaintiffs Melba and Jim Parsons. The subsidiary had been heavily financed on an on-going basis since 1976 by the defendant First Alabama Bank of Montgomery. By the fall of 1978, the bank had outstanding fully secured loans of one million dollars and was the subsidiary's largest creditor.

---

[9] Parsons-Mobile was the sole owner of Parsons-Montgomery; of the 100 shares of Parsons-Mobile, James Parsons owned 1 share, Melba, his wife, owned 98 shares, and a Baptist minister owned the remaining share. Parsons-Mobile, the individual Parsons and the Trustee in bankruptcy are petitioners here.

"At about this time the subsidiary began experiencing financial difficulty and anticipated inability to repay its debts. Mr. Parsons and an agent of the bank discussed refinancing the subsidiary's debt. The discussion between Parsons and the bank not only focused on refinancing but also included an unsuccessful attempt to sell the subsidiary to an out-of-town corporation. After the first attempt to sell fell through, the bank contacted a local businessman, Michael Orange, with whom the bank had done business, to determine if he were interested in buying the subsidiary. Although Orange declined to buy the company, he apparently offered to take over management of the company for a fee plus a stock option.

"The plaintiffs claim that the bank conditioned the grant of any additional credit on Parson's agreement to accept Orange as the manager of the subsidiary with an option to acquire a majority interest in the subsidiary in lieu of other compensation. *The bank claims that it never agreed to extend any credit and did not require that Orange be granted the controlling stock option.* The jury found that the bank did condition the extension of credit on the appointment of Orange as manager and on granting the option.

"The District Court, although denying the defendant's motions for summary judgment and a directed verdict, heard all the evidence and ultimately granted the bank's motion for judgment notwithstanding the verdict. The plaintiffs contend that in granting the judgment n.o.v., the District Court usurped the function of the jury and substituted its judgment of the credibility of the witnesses for that of the jury."

* * * *

"* * **The subsidiary was in financial difficulty and the bank was simply reluctant to grant additional credit...*" (Emphasis supplied.)

It is difficult to understand Petitioners' argument that the foregoing is a "[recognition] that the trial court erred in holding Plaintiffs' evidence was not sufficient to create a jury question...." (Bf. p. 20) The argument is without merit.

As the court below noted (747 F.2d at 1370; A-3), Parsons-Montgomery was adjudicated an involuntary bankrupt in April of 1979 and its Trustee "chose not to participate" in Federal Action.[10] The district court found that the Trustee "was privy to the parties" in Federal Action. (A-35 of Petition.) The court of appeals below held (747 F.2d at 1378; A-20):

> "The district court in this injunction proceeding found that the Trustee was bound by res judicata because he was in privity with the plaintiffs in the BHCA action."[11]

The courts below have correctly held that the two complaints alleged the same acts or omissions. Introduced below (JA 9-25(a); Appendix A to this brief) is a side-by-side comparison of substantive paragraphs of the state and federal complaints. This comparison graphically demonstrates that the Federal and State complaints are virtual copies of each other. Incomprehensible are petitioners' repeated and erroneous assertions that Federal Action alleged "only" one claim and that "no issue litigated in the Federal Action was repeated in the State Action."[12]

---

[10] The Trustee was added as a party plaintiff by the state court in State Action in October of 1979 and the Trustee's later pleadings "realleged" all paragraphs of the complaint in State Action as amended and previously filed. (JA 26-28)

[11] Petitioners thus erroneously assert (Bf. p. 7) that "[t]he district court made no finding that the Trustee had been 'virtually represented' by the parties to the Federal Action...."

[12] Brief, pp. 4, 11, 19, 21, 22, 27, 33, 36, 40 and 43. Petitioners obviously fail to understand that a "claim" or "cause of action" does not multiply by the process of alleging the same facts in different actions

Discovery was conducted jointly and simultaneously in State and Federal Actions, and all parties to this action participated.[13] Federal Action was tried first; the issue of liability was tried separately; and, after verdict for the plaintiffs, the district court granted Bank's motion for judgment n.o.v., and on June 17, 1981 dismissed Federal Action on its merits ("Federal Judgment"). (JA 72-88) The district court found numerous acts and omissions which were put in issue again and relitigated by plaintiffs in State Action. For example, the crux of the state allegations of fraud was an alleged promise of unlimited financing made with no intention to perform. Proof of this same promise of financing was necessary for recovery in the Federal Action. Although petitioners (plaintiffs there) sought to prove such a promise, Bank denied that one was ever made.[14] The district court in its 1981 Federal Judgment held that:

> "This Court is of the opinion that no reasonable person would conclude from that conversation that the Bank agreed to lend either figure." (JA 80)

---

and splitting the remedies sought or theories of recovery. Petitioners erroneously assert (Bf., p. 8) that *Restatement of Judgments,* 2nd, § 24, is not good law, although this Court, as discussed, *infra.* in Part II of Argument, has characterized the *Restatement* definition there as a "pragmatic approach" to the definition of a "cause of action." *Nevada v. United States,* 462 U.S. 1104, ____, 77 L.Ed.2d 509, 525, n.12.

[13] The cover and appearance sheets of 15 separate depositions are included in the Joint Appendix (JA 368-397). These materials show appearances and participation by attorneys for all petitioners, including the Trustee in bankruptcy of Parsons-Montgomery, and all contain the express stipulation that the depositions "may be used in both cases."

[14] See opinion in appeal from Federal Action, 679 F.2d 242 at 244-246.

Another area common to the Federal and State actions concerned involvement of one Michael Orange. The court of appeals in 679 F.2d 242, 244-46, *supra.*, pp. 5-6, has recounted the federal testimony. The State action plaintiffs similarly contended that Bank agreed that if Orange became chief executive officer and obtained a majority interest in the Parsons-Montgomery subsidiary, Bank would make additional loans to subsidiary. State plaintiffs also contended that Bank required Orange as part of a fraudulent conspiracy to take over subsidiary. On this issue the district court's Federal Judgment contains extensive findings, including (JA 84):

> "Parsons' theory for recovery seems to rise or fall upon an implication that somehow the Bank maneuvered Mr. Parsons into the situation that he could not refuse Orange's offer to manage the business for $10,000.00 and a controlling interest. However, Mr. Parsons admitted that he made no other attempt to get anyone else to manage the business, and he offered no evidence that he had any dissatisfaction with the arrangement he made with Orange. Only after Orange became manager of the business and (finding that the financial condition and credit of the business was worse than Orange had been led to believe by Parsons) had stated that he could not continue, did Parsons find any criticism of the business proposal made by Orange."

In view of petitioners' repeated mischaracterization of these findings as "immaterial" and "mere dicta" (e.g. p. 20), particularly noteworthy is the critical importance accorded these findings by the court of appeals below (747 F.2d at 1371; A-6-7):

> "In an opinion granting the bank's motion for judgment n.o.v., the federal court made several important findings of fact in addition to holding that the Bank did not violate the BHCA.

* * * *

> "Although the Bank introduced Orange to Parsons as a potential purchaser of the company, Parsons and Orange reached an agreement independently of the Bank. * * * In the final analysis, the district court found that the Bank had not promised the Parsons anything, nor had it forced the Parsons to take any action. It was not until the actual foreclosure and sale of assets, a normal procedure, that the Parsons had to give up ownership of the company's assets, which resulted in Parsons-Montgomery being adjudicated an involuntary bankrupt. It is undisputed that the Bank, at all relevant times, had a right to proceed with this foreclosure.
>
> "In view of these findings, the district court in this injunction proceeding found that its earlier judgment was res judicata as to the Parsons' state claims of fraud and commercial unreasonableness."

Moreover, Bank introduced below an analysis of the allegations of the plaintiffs in their state complaints; the complaints themselves; the entire state court docket sheet; proposed witness lists, and lists of those who actually testified. This evidence was supplemented by Exhibits 9 and 10 of the Parsons which contained the contentions of the parties in State Action. (JA 221-226)

The analysis of the state complaints and the complaints themselves—when compared with the foregoing findings and opinion of the district court in Federal Action (JA 72-88)—demonstrate the correctness of its conclusion in this case that the state plaintiffs sought to "relitigate identical issues in separate courts." (A-32) And the contentions of state plaintiffs Parsons (Defendants' Exhibit 10; JA 224) confirm this conclusion. Indeed, those contentions, referring to the state complaint for elaboration, track almost precisely the subject matter

of the findings and opinion of the district court in Federal Action.[15]

Petitioners have argued strenuously—and erroneously—that the issue of the commercial reasonableness of the foreclosure sale of subsidiary's assets to Orange's company—an issue in State Action as to all plaintiffs there—was not decided in Federal Action. The federal complaint and the district court's findings clearly contradict this erroneous assertion.

The side-by-side comparison of the two complaints (JA 9-25(a); Appendix A) shows that paragraph 27 of Federal complaint and paragraph 30 of State complaint contain substantially identical allegations of commercial unreasonableness, and claim to the penny identical damages of $2,419,945.89, said to flow from the alleged wrongful acts and omissions. And the district court's Federal Judgment found:

> "On January 8, 1979, Mr. Herbert, the loan officer at the Bank, reviewed the files and, finding Parsons Steel of Montgomery seriously in arrears, commenced foreclosure proceedings against Parsons Steel. On that date, Mr. Parsons went into the Bank and signed waivers in which he acknowledged full notice of foreclosure proceedings and

---

[15] (a) Promises of Bank to advance additional funds; (b) promises of Herbert to make additional loans and advances if Parsons "would make Orange chief executive officer of subsidiary and grant him a majority interest in the stock of subsidiary"; (c) Orange's statement to Jim Parsons that Orange would seek additional loans from Bank for Parsons-Montgomery; (d) Bank "through Richardson [and Herbert] led Parsons to believe that [Bank] would provide for the continuing financial needs of [subsidiary]"; and (e) "the representations set out above were made by Defendants as part of the conspiracy to defraud Plaintiffs were false and were made without the intention of performing them at that time and specifically to induce action by these Plaintiffs." Moreover, there was a contention that "the sale of the assets of [subsidiary] on or about January 17, 1979 was conducted in a commercially unreasonable method and manner in violation of Alabama law. These Plaintiffs claim damage for injuries suffered as a result of the commercially unreasonable sale separate and in addition to damages suffered by [subsidiary]."

waived other notice normally to be given him with full knowledge that Mr. Orange was to purchase the business for an amount sufficient to pay the Bank the full amount owed it. Mr. Parsons told Mr. Herbert that he was glad it was over and that he was through and was returning to Mobile to his other business. (JA 77)

* * * *

"Indeed, Mr. Parsons admitted that he was glad the final foreclosure was over. * * * Mr. Parsons signed waivers agreeing to foreclosure of mortgages with knowledge that Mr. Orange would buy in at the mortgage sale. As a result of this foreclosure, Mr. Parsons was relieved of a personal obligation to the Bank of at least $176,000.00, his wife was relieved of a substantial personal obligation, and his Mobile business' premises were relieved of a mortgage for at least $200,000.00. (JA 81)

* * * *

"Even then, Parsons and Orange discussed—and Parsons appeared to agree—that Parsons' best interest lay in a foreclosure by the Bank whereby Orange would pay off the Bank's loan on which Mr. Parsons was surety and on a part of which Mrs. Parsons was surety. Their interest was in avoiding personal liability. (JA 84)

* * * *

"(See his waiver of notice, etc.):..." (JA 86)

The court of appeals below agreed.[16]

---

[16] (747 F.2d at 1373; A-11): "Allegations that the sale was commercially unreasonable were included in the federal BHCA complaint as part of the proof of damages. That is, the Parsons alleged that the defendants' wrongful conduct prior to the sale resulted in the Parsons not receiving a fair price for their company assets at the foreclosure sale."

Wholly irrelevant are the repeated assertions of petitioners that respondents are barred from seeking injunctive relief under 28 U.S.C. § 2283 because they raised defenses of res judicata and collateral estoppel in State Action. Since injunctive relief presupposes an absence of other adequate remedies, it is important for this Court to know the extensive efforts of Bank to exhaust other remedies before seeking federal relief against such impermissible attempts to relitigate.

The decision affirming Federal Judgment, 679 F.2d 242, came down on June 25, 1982 (JA 89) and rehearing was denied on August 24, 1982. The state action case summary (Plaintiffs' Exhibit 1; JA 167-180) shows that the first state judge withdrew after recusal on August 27, 1982 (JA 175); that renewed motions for summary judgment and supporting materials were filed on October 12, 1982, were heard on October 14 (JA 175), and were not denied until January 13, 1983 (JA 176); that motions for reconsideration were filed including a request by Bank and Herbert on January 28, 1983—on the eve of the scheduled trial—that the state trial court "certify res judicata question to appellate court. . ." (JA 177) Only after Bank and Herbert faced irreparable injury—the possible loss of millions of dollars from attempted state relitigation—did they seek the federal injunctive relief to which the courts below correctly held they were entitled. They were then clearly deprived of the fruits of their earlier federal victory and a federal injunction was plainly essential to protect the integrity of the earlier federal judgment and to effectuate it.

The court below correctly held (747 F.2d at 1376; A-17):

> "We see no reason to disturb this holding. The Bank should not be penalized for its reluctance to come back to federal court while it was not clear whether the federal court's prior judgment was in danger of being nullified.
>
> * * * *
>
> "A federal court is empowered to enjoin state court proceedings to protect its judgment and § 2283 does not limit this power to specific points in time in state court trials or appellate procedure."

Trustee argues that he was deprived of an opportunity to present evidence in Federal Action in support of his claims of a commercially unreasonable foreclosure sale. Upon remandment to the district court, however, the evidence presented there was without dispute that his lawyer, in State Action, adopted the Parsons' lawyers' arguments to the jury; and, as the district court found,[17] "every word of the Trustee's attorneys' statements during the State Court trial was devoted to presale activities of Michael Orange and the Bank's agent Herbert. No suggestion was made that the Defendants in the State court case did anything wrong after the sale." The court below correctly held that the Trustee was bound by the adjudication in Federal Action.[18]

In a remarkable error, petitioners assert (p.7) that the district court "made no finding that the injunction was necessary to 'protect or effectuate' its prior judgment but instead based the injunction solely on its conclusion that the Federal Action barred the State Action although clearly recognizing the two actions involved different causes of action." This statement is wholly inaccurate. The district court issued its injunction "to bar further relitigation of proceedings already decided in this Court"; and noted the public interest "in deterring relitigation of suits."[19] Moreover, as already noted, the court of appeals held that the district court issued its injunction "to protect or effectuate its prior judgment," because the state court judgment "nullified" the earlier federal court judgment.[20]

---

[17] Opinion of March 29, 1985, JA 349-350, and Appendix A to Opposition.)

[18] 747 F.2d at 1380; A 24-25. See, quotation, n. 7, *supra.*

[19] A-42 of petition.

[20] *Supra,* n. 6

Exacerbating this inaccuracy, petitioners argue (p.7) that the court of appeals majority, in an "unprecedented decision," held that § 2283 was an exception to the full faith and credit act. The actual holding below was that, although § 2283 generally prohibited injunctions to stay proceedings in a state court, Congress had conferred that power on federal courts—as an exception to this prohibition—when it enacted the relitigation exception in 1948; and "while a federal court is generally bound by other state court determinations, the relitigation exception empowers a federal court to be the final adjudicator as to the res judicata effects of its prior judgments on a subsequent state action."[21]

Petitioners mislead in their attempted characterization of the dissenting opinion below. (Bf., p. 9) They pointedly overlook that judge's agreement with the district court and the majority below "that the state court litigation repeated the federal court issues—or issues that could have been resolved there." (747 F.2d at 1382; A-30)

SUMMARY OF ARGUMENT

I.

The courts below have correctly interpreted and applied the anti-injunction statute, 28 U.S.C. § 2283 in a classic context—to effectuate an earlier judgment of the district court; to enjoin its attempted nullification by a later state court judgment; and thus to safeguard to respondents the fruits of their earlier federal victory. This is precisely why Congress enacted the relitigation exception of § 2283 in 1948, namely, to assure by express legislative language that federal courts have the power to enjoin proceedings in a state court "to protect or effectuate" their judgments.

---

[21] 747 F.2d at 1376; A-16.

Congress rejected the alternative posed by the majority in *Toucey v. New York Life,* 314 U.S. 118. Congress opted to protect a federal judgment against becoming the mere basis for a plea of res judicata—to be examined by another court unfamiliar with the record already made—to determine whether the issues were or were not settled by the former adjudication. Moreover, Congress decided that the federal district judge who had conducted the earlier litigation knows best what he did and did not decide. The court below thus correctly noted that "the federal district judge, having tried the federal action, was in a uniquely qualified position to determine that the federal action was res judicata as to the state action." (747 F.2d at 1375; A-14)

This Court has expressly recognized that Congress, when it enacted the "relitigation exception" to § 2283, had legislated so as to permit "a federal court to enjoin relitigation in a state court of issues already decided in federal litigation." *Mitchum v. Foster,* 407 U.S. 225, 235; *Vendo Co. v. Lektro-Vend Corp.,* 433 U.S. 623, 630, et seq.

An injunction by a federal district court against enforcement of a state court judgment, issued "to protect or effectuate" an earlier federal judgment of that court, does not constitute impermissible review of a state court judgment and impingement on the appellate powers of this Court. Nor does 28 U.S.C. § 1738 prevent a federal court from exercising the powers conferred by Congress in § 2283 and staying by injunction a later state judgment which seeks to nullify the prior judgment of that federal court. Federal res judicata law applies when a federal court is determining the effect of a federal judgment, as the court below correctly held. Restatement of Judgments 2d, Sec. 87.

Moreover, the court below correctly held that the power conferred on federal courts under § 2283 "does not limit this power to specific points in time in state court trials or appellate procedure." (747 F.2d at 1377; A-17) *Hill v. Martin,* 296 U.S. 393, 403.

II.

Petitioners sought to relitigate in the Alabama state court matters which had been litigated and decided against them in the Federal Action; and to litigate other matters which were not, but which could have been litigated in the Federal Action. Without question, the verdict and judgment in State Action deprived respondents of the fruits of their earlier judgment on the merits in Federal Action. Petitioners filed virtually identical compliants in both cases, even to the alleged damages incurred. In Federal Action they chose to seek a remedy only under the Bank Holding Company Act ("BHCA"), and to assert remedies for alleged fraud and commercial unreasonableness in State Action. This is precisely what res judicata, collateral estoppel and impermissible relitigation prohibit. Petitioners could have sought all of their state remedies as to all relevant parties in Federal Action, and were not limited there to relief under BHCA.

III.

Although the petition impermissibly seeks to raise for the first time a due process argument based on alleged unauthorized representation of the Trustee in the Federal Action, the argument itself has no merit. The Trustee was in privity with the other petitioners, as the courts below correctly found, and is bound by the federal adjudication of those matters. *Montana v. United States,* 440 U.S. 147; *Nevada v. United States,* 462 U.S. 1104, ____, 77 L.Ed.2d 509, 524; *General Foods v. Mass. Dept. of Health,* 648 F.2d 784, 787 (1st Dir. 1981).

The Trustee's knowing election to stay out of Federal Action is reason enough to bar him from seeking to relitigate elsewhere issues which were in fact litigated in Federal Action; and matters which were not, but which could have been determined in Federal Action. The Trustee was adequately represented in the prior federal litigation; is in privity with the other petitioners; and is bound as they are by the results of Federal Action. Trustee had a full and fair opportunity to present evidence and argument.

ARGUMENT

I.

The Courts Below Correctly Interpreted and Applied the Anti-Injunction Statute 28 U.S.C. § 2283.

The courts below have applied the relitigation exception of 28 U.S.C. § 2283 in a classic context—to effectuate the earlier judgment of the district court; to enjoin its attempted nullification by a later state court judgment; and thus to safeguard to the victor in the earlier federal litigation the fruits of that victory. This is precisely why Congress enacted this exception to § 2283 in 1948, namely, to assure by express legislative language that federal courts have the power to enjoin proceedings in a state court "to protect or effectuate" their judgments. As the code reviser has noted, Congress intended to adopt, by this legislation, the position of the "vigorous dissenting opinion" in *Toucey v. New York Life,* 314 U.S. 118, 144.[22]

The arguments of petitioners offend more than the long established legislative policy embodied in § 2283. In any circumstances, these arguments offend as well the sound judicial policies enunciated by this Court that efficient judicial administration, and public confidence in the judicial process, dic-

---

[22] So characterized by Congress which adopted it when it reversed the *Toucey* decision by the enactment of § 2283. This decision was criticized by the "vigorous dissenting opinion" (314 U.S. at 144):

> "This alternative is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of res judicata which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication. We, too, desire that the difficulties innate in the federal system of government may be smoothed away without a clash of sovereignties but we find no cause for alarm in affirming a court which forbids parties bound by its decree to fight the battle over on another day and field." (Footnotes omitted)

tate the conclusion that "it is [no] longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." *Blonder-Tongue Labs. v. Univ. of Illinois Found.*, 402 U.S. 313, 328.[23] The offense is exacerbated at bar. After petitioners had a full and fair opportunity to litigate in Federal Action issues which they later sought to relitigate in State Action, they revealed a case so flimsy that no reasonable person could arrive at a verdict for petitioners; and a district court judgment, which set aside such a jury verdict and entered a judgment n.o.v. for Bank, was affirmed. 679 F.2d 242, 246.[24]

Petitioners erroneously assert that when federal courts determine whether an injunction against state proceedings is necessary to "protect or effectuate" their judgments, they review state court judgments, and thus impermissibly impinge on the exclusive power of this Court. The argument is wholly without merit. Courts and commentators have often described

---

[23] This Court reiterated that conclusion in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327-328, and *Nevada v. United States*, 462 U.S. 1104, ____, 77 L.Ed.2d 509, 523, et seq.

[24] The test of *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969), after all of the evidence is viewed in the light and with all reasonable inferences most favorable to petitioners. That decision follows this Court's requirement in *Brady v. So. R. Co.*, 320 U.S. 476, 479-480, that judgment n.o.v. is appropriate only where "there can be but one reasonable conclusion as to the verdict." Although Trustee was not a party to Federal Action, he deliberately chose to stay out and his interests, as the courts below have correctly held, were fully and adequately represented in Federal Action by the parties plaintiff there and their attorneys.

the process Congress had in mind to safeguard the effect of federal court judgments.[25]

Congress, when it enacted § 2283 in 1948, confronted and overruled this Court's decision in *Toucey v. New York Life,* 314 U.S. 118, which had answered negatively the question: "Does a federal court have power to stay a proceeding in a state court simply because the claim in controversy has previously been adjudicated in the federal court?"[26] As this Court taught in *Mitchum v. Foster,* 407 U.S. 225, 236:

> "The congressional response to Toucey was the enactment in 1948 of the anti-injunction statute in its present form in 28 U.S.C. § 2283, which, as the Reviser's Note makes evident, served not only to overrule the specific holding of Toucey, but to restore 'the basic law as generally understood and interpreted prior to the Toucey decision.' "[27]

---

[25] Obviously inapposite are cases such as *Rooker v. Fidelity Trust,* 263 U.S. 413 (cited in Petitioners' Bf. p. 17) which prohibit a federal injunction against a state judgment asserted to have been based on an unconstitutional state statute. And see, discussion of *A.C.L. v. Brotherhood,* 390 U.S. 281 at 287, *infra.* n. 31.

[26] 314 U.S. at 126.

[27] Footnotes omitted. One of these footnotes cites Revisors Note for an appropriate interpretation of § 2283; and this note cites the "vigorous" dissenting opinion of Justice Reed which Congress intended to adopt. Quoted, n. 22, *supra.*

Contemporary and knowledgeable commentary demonstrates that whatever philosophical arguments might have supported the proposition that ordered federalism permits review of state court determinations only in this Court, Congress—empowered to confer jurisdiction on lower federal courts—opted to permit those courts to review state court judgments to prevent relitigation of federal judgments in state courts; to "protect or effectuate" earlier federal judgments; and to assure that the winner in a federal court would not be deprived of the fruits of this victory by a later contrary state judgment which this Court might or might not decide to review.[28]

---

[28] *Moore's Commentary on the United States Judicial Code,* § 0.03(49), pp. 410-411:

> "[Sec. 2283] overrules the holding of the *Toucey* case and adopts the theory of the 'relitigation' cases, which *Toucey* had rejected. In other words where a federal court has adjudicated a matter, this court can protect or effectuate its judgment, whether in personam or in rem, by enjoining, at the instance of the prevailing party, relitigation of the matter. The party prevailing in the federal court is not obliged to plead his federal judgment in the state court action and, if eventually unsuccessful, seek Supreme Court review of the adverse state judgment." (Footnotes omitted)

The American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts,* § 1372, p. 306 (1968) commented twenty years later:

> "It has been argued that the relitigation exception is undesirable, and that where there is another remedy, such as a plea of res judicata in the state court, the federal court, out of proper deference for the court of the state should not stay the state proceedings....Ordinarily a federal court would and should so defer. The requirements of irreparable harm and lack of any other adequate remedy apply implicitly under the present statute....But power should exist to grant the injunction in the unusual case where those requirements are met. The matter was put forcefully by Justice Reed in his dissent in the *Toucey* case:..."

Redish, *The Anti-Injunction Statute Reconsidered,* 44 U. of Chicago L. Rev. 717, 723-724 (1977) taught a decade later:

Another commentary has analyzed the process intended by Congress:

> "Since appeal of right no longer exists from a state court's failure to give res judicata effect to a federal decision, and since the Supreme Court's decisions to grant writs of certiorari are based more upon considerations of general public interest than of the interests of the individual litigants, interlocutory review of state court action by injunction seems a satisfactory mode of protecting federal judgments."[29]

This Court has expressly recognized that Congress, when it enacted the "relitigation exception" to § 2283, had legislated so as to permit "a federal court to enjoin relitigation in a state court of issues already decided in federal litigation." *Mitchum*

> "It is, of course true, as Justice Reed argued, that absent the relitigation exception the only recourse to preserve the finality of the prior federal judgment would be a plea of res judicata in the subsequent state court proceeding. But Justice Reed—and apparently the Congress in enacting the exception—concluded that such a remedy was wholly inadequate. * * * One possible explanation, not articulated by either Justice Reed or the Reviser, is that the relitigation exception reflects pervasive mistrust of the state courts' ability and willingness to comprehend federal judgments and to accord them proper respect."

Redish noted, moreover: (n. 31) "The overwhelming majority of decisions appear to proceed under the assumption that a party need not have sought and been denied res judicata relief in the state court action before seeking an injunction in federal court pursuant to the relitigation exception." Redish cited, as two of three illustrative cases, *Donelan v. New Orleans Term. Co.*, 474 F.2d 1108 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973) and *Woods Exploration Co. v. Aluminum Co. of Amer.*, 438 F.2d 1286 (5th Cir. 1971) *cert. denied*, 404 U.S. 1047.

[29] Note, *Federal Power to Enjoin State Court Proceedings*, 74 Harv. L. Rev. 726, 734, cited in *Woods Exploration & Pro. Co. v. Aluminum Co. of Amer., supra*, n. 36.

v. Foster, 407 U.S. 225, 235. See also this Court's discussion in *Vendo Co. v. Lektro-Vend Corp.,* 433 U.S. 623, 630 et seq.

The decisions below do not contravene *A.C.L.R.Co. v. Brotherhood,* 398 U.S. 281, as petitioners erroneously suggest. This Court has repeatedly made plain that this case simply holds that federal courts do not have *inherent* power to enjoin state proceedings but must abide by the *express* exceptions to § 2283.[30] The injunction at bar was premised upon the specific relitigation exception in § 2283, and not upon any asserted inherent power of the federal court.[31]

---

[30] See discussion in *Mitchum v. Foster, supra.* and *Vendo Co. v. Lektro-Vend Corp., supra.*

[31] Indeed, Justice Black, for the majority, and dissenting Justices Brennan and White agreed that a federal district court could enjoin a later state court judgment in order to "protect or effectuate" an earlier federal judgment. Although "[p]roceedings in state courts should *normally* be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court,..." the majority opinion recognized that § 2283 was an exception to this principle when federal intervention by a district court was necessary "to protect or effectuate" an earlier judgment of that federal court. (398 U.S. at 287; emphasis supplied.)

The majority in *ACL* held that the later federal injunction was precipitated by a supervening decision of this Court, and was not an effort by the federal district court to protect or effectuate an earlier judgment—a judgment which the majority found to have been based on the Norris-LaGuardia Act's withdrawal of "jurisdiction" of a federal court to issue an injunction in that labor dispute. 29 U.S.C. § 101. Thus, there was no decision on the merits. The dissenters disagreed and were of the opinion that the district court had, indeed, acted to protect or effectuate its earlier judgment—a judgment which "obviously decided considerably more than the threshold question of whether the Norris-LaGuardia Act withdrew jurisdiction to grant federal injunctive relief in the circumstances of this case." (398 U.S. at 299)

The quotation from *ACL* in Petitioners' brief (p. 24) is not even addressed to the relitigation exception of § 2283 but rather to the "necessary in aid of jurisdiction" exception.

A long line of federal decisions accord with the decision below.[32]

Petitioners attempt an extraordinary assault on the foregoing judicial authorities, legislative history, and knowledgeable commentary. They concede, remarkable to say, that the decisions below must stand if the court below correctly held: "it is now settled that the relitigation exception enables a federal court to enjoin state litigation which is precluded by the doctrine of res judicata." (747 F.2d at 1376; A-16) Petitioners argue that the court below had thus impermissibly expanded the scope of § 2283 and erroneously assert that "mere applicability of the doctrine of res judicata is not sufficient to justify an injunction of a state court proceeding." (Bf., p. 22) Petitioners would have this Court overturn almost 40 years of unbroken, and uniform interpretation of the congressional purpose when the 1948 relitigation exception was enacted as § 2283. The key was a congressional decision to adopt the dissent of Justice Reed in *Toucey,* that a federal judgment was entitled to federal injunc-

---

[32] *United States v. District of Columbia,* 654 F.2d 802 (D.C. Cir. 1981), *cert. denied,* 454 U.S. 1082; *United States v. Amer. Society of Composers etc.,* 442 F.2d 601 (2nd Cir. 1971); *Allied Mutual Ins. Co. v. Roberson,* 306 F.2d 130 (4th Cir. 1962); *In re Corrugated Container Antitrust Litigation,* 659 F.2d 1332 (5th Cir. 1981), *cert. denied,* 456 U.S. 756; *Meridian Investing Development Corp. v. Suncoast Highland Corp.,* 628 F.2d 370 (5th Cir. 1980); *Bank of Heflin v. Miles,* 621 F.2d 108 (5th Cir. 1980); *Seaboard Coast Line R. Co. v. Union Camp Corp.,* 613 F.2d 604 (5th Cir. 1980), *cert. denied,* 449 U.S. 835; *Southwest Airlines Co. v. Texas International Airlines, Inc.,* 546 F.2d 84 (5th Cir. 1977), *cert. denied,* 434 U.S. 832; *Aerojet-General Corp. v. Askew,* 511 F.2d 710 (5th Cir. 1975), *cert. denied,* 423 U.S. 908; *Donelon v. New Orleans Terminal Co.,* 474 F.2d 1108 (5th Cir. 1973), *cert. denied,* 414 U.S. 855; *Woods Exploration & Pro. Co. v. Aluminum Co. of Amer.,* 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047; *Silcox v. United Trucking Service,* 687 F.2d 848 (6th Cir. 1982); *Harper Plastics v. Amoco Chemicals Corp.,* 657 F.2d 939 (7th Cir. 1981); *Wood v. Santa Barbara Chamber of Commerce, 705 F.2d 1515 (9th Cir. 1983), cert. denied,* 104 S.Ct. 1446; *Brown v. McCormick,* 608 F.2d 410 (10th Cir. 1979).

tive protection and thus to something more than "only the basis for a plea of res judicata which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication." (314 U.S. at 144) Petitioners, indeed, go even further and attack the concern voiced by Justice Reed as a "weak" argument. (Bf., p. 25) Clearly, Congress did not agree and adopted his "vigorous" opinion as the legislative law of this land.

But petitioners' flawed analysis does not end here. They assert that even if Section 2283 does permit the injunction at bar, principles of comity, federalism and equity nevertheless require reversal. Again, petitioners urge this Court to ignore almost 40 years of consistent interpretation of a congressional determination. Congress then agreed with Justice Reed that a federal court winner could not be forced to bring a plea of res judicata in a state court, "unfamiliar with the record already made," and if eventually unsuccessful seek review in this Court of an adverse state judgment. Congress and the federal judiciary, since 1948, have considered that process an inadequate remedy, and not required by any principles of comity or federalism which Congress then rejected when it overruled *Toucey*.[33]

Petitioners cite cases (pp. 14-15) which discuss the preclusive effect, under 28 U.S.C. § 1738, of earlier state court decisions in federal courts. The short answer is that these cases are simply irrelevant to the issue in this case, namely, the authority of a

---

[33] Petitioners' reliance on *Mitchum v. Foster*, 407 U.S. 225, 243, is misplaced. (Bf., pp. 26, et seq.) That case did not involve the relitigation exception of § 2283, and thus did not involve the policy determinations of Congress when it overruled *Toucey*. *Mitchum* found, even though unarticulated, express authorization by Congress to permit injunctions in civil rights actions under 42 U.S.C. § 1983 in certain circumstances.

federal court, under § 2283, to enjoin state proceedings in order to protect and effectuate a prior federal judgment. This Court in *Marrese v. Amer. Academy of Orthopedic Surg.*, ____ U.S. ____, 53 U.S.L.W. 4265, 4268, held that a federal court should not give greater claim preclusion effect to an earlier state judgment on the merits than the state itself would have given. Conversely, the court below has correctly held: "It is undisputed that federal res judicata law applies in the present case where a federal court is determining the effect of a federal judgment."[34]

The *reductio ad absurdum* of petitioners' argument is that a federal court would be powerless, despite § 2283, to stay any state proceeding which nullified its prior judgment *unless* a federal injunction issued whenever there was a possibility that a state court might rule on the preclusive effect of an earlier federal judgment, and before the state court had an opportunity to do so. Such an absurd process would exacerbate, and certainly not relieve, friction between state and federal courts; and it would thwart the carefully defined congressional purpose of the 1948 revision of § 2283.

Petitioners advance the spurious suggestion that this unseemly "rush"—and their imagined conflict between § 2283 and § 1738—can be avoided if a federal court seeks to protect or effectuate its earlier judgment by injunction *only when* a later state court judgment, although declining to recognize the bar of the prior federal judgment, is a non-final rather than a final state judgment. In the latter circumstance, petitioners argue that a federal injunction is impermissible because of § 1738. But the injunction below meets even petitioners' spurious test since it was issued when the state judgment had lost its finality by virtue

---

[34] 747 F.2d at 1372, n.9; A-9. *Restatement of Judgments*, 2nd, § 87 accords: "Federal law determines the effects under the rules of res judicata of a judgment of a federal court."

of a timely and then pending post-trial motion for new trial and judgment n.o.v.[35]

Moreover, the court below correctly held that the power conferred on federal courts, under § 2283, to enjoin state court "proceedings" to protect their judgments, "does not limit this power to specific points in time in state court trials or appellate procedure." (747 F.2d at 1377; A-17) This Court, construing the term "proceedings" in a state court under the predecessor of § 2283, held that the term is "comprehensive" and "includes all steps taken or which may be taken in the state court . . . from the institution to the close of the final process. It applies to appellate as well as to original proceedings; . . ." *Hill v. Martin,* 296 U.S. 393, 403.[36]

The court below correctly rejected the argument made there, and renewed here, that Bank had waived its right to federal injunction by its attempt to seek a res judicata and collateral estoppel holding from the state court (747 F.2d at 1376; A-17):

> "The Bank should not be penalized for its reluctance to come back to federal court while it was not clear whether the federal court's prior judgment was in danger of being nullified."[37]

---

[35] *Leishman v. Assoc. Wholesale Electric Co.,* 318 U.S. 203; *Healy v. Penn. R. Co.,* 181 F.2d 934 (3rd Cir. 1950); 9 Moore's Federal Practice, § 110.08[3]. Authorities interpreting the Federal Rules of Civil Procedure guide construction of Alabama's Rules of Civil Procedure. *Scott v. Lane,* 414 So.2d 939 (Ala. 1982).

[36] Other federal courts have agreed with the court below that § 2283 is not emasculated by a state court's refusal to be bound by an earlier federal judgment. *Silcox v. United Truck Serv.,* 687 F.2d 848 (6th Cir. 1982); *Brown v. McCormick,* 608 F.2d 410 (10th Cir. 1979).

[37] By means of an erroneous reading of *Restatement of Judgments,* 2nd, § 26, p. 2 35—a reading which ignores that section's direction to

The courts below correctly provided contemporary restatement of the importance which Congress gave in 1948 to the superior, and thus crucial, familiarity of a federal district court with what was litigated, or could have been litigated in a prior federal action which culminated in a judgment on the merits. The court below correctly noted that "the federal district judge, having tried the federal action, was in a uniquely qualified position to determine that the federal action was res judicata as to the state action." (747 F.2d at 1375; A-14)

II.

The Courts Below Correctly Invoked § 2283 In Order To Prevent Relitigation In The Alabama State Courts of Matters Which Were Or Could Have Been Litigated In Federal Action Which Had Culminated In A Prior Judgment On the Merits.

Without question the judgment in Federal Action was on the merits and was affirmed. (679 F.2d 242; JA 89). Without question petitioners sought to relitigate in the Alabama state court

---

illustration 1 concerning actions "in the same jurisdiction"— petitioners seek to compound their baseless argument of waiver by suggesting waiver as well for a failure, *prior to federal judgment,* to object to a splitting of causes of action. Respondents could not have done so under applicable Alabama and federal law—two jurisdictions, not one. Under federal law, *Ermentrout v. Commonwealth Oil Co.*, 220 F.2d 527, 530 (5th Cir. 1955):

> "[T]he pendency of a state court action in personam is no ground for abatement or stay of a like action in the federal court, although the same issues are being tried and the federal action is subsequent to the state court action. The federal court may not abdicate its authority or duty in favor of the state jurisdiction. (Cit.)..."

The pendency of a later filed federal action does not require an election between that action and an earlier filed state one. Sec. 6-5-440, Alabama Code of 1975; *Johnson v. Brown Service Ins. Co.*, 293 Ala. 549, 307 So.2d 518.

matters which had been litigated and decided against them in the Federal Action; and to litigate other matters which were not, but which could have been litigated in the Federal Action. Without question the verdict and judgment in State Action deprived Bank and Herbert of the fruits of their earlier judgment on the merits in the Federal Action. Thus, the district court—in a classic case—correctly enjoined further prosecution of State Action.

Indeed, petitioners do not even present for review in this Court the question of the correctness of the decisions below that State Action was barred by the judgment in Federal Action under principles of res judicata and collateral estoppel. (Bf., p. 28, n.20)

The courts below, citing *Nilsen v. City of Moss Point,* 701 F.2d 556, 560, n. 4 (5th Cir. 1983), adopted the definition and comments of § 24 of *Restatement of Judgments,* 2nd.[38]

This Court's recent decision, *Nevada v. United States,* 462 U.S. 1104, ____, 77 L.Ed.2d 509, 525, n. 12, has characterized Sec. 24 as a "pragmatic appro[illegible]h" to the definition of a "cause

---

[38] "a. *Rationale of a transactional view of claim.* In defining claim to embrace all the remedial rights of the plaintiff against the defendant growing out of the relevant transaction (or series of connected transactions), this Section responds to modern procedural ideas which have found expression in the Federal Rules of Civil Procedure and other procedural systems.

* * * * *

"The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split."

of action."[39] Petitioners clearly err when they argue (Bf., p. 28) that the court below "applied a definition of res judicata never accepted by this Court . . . "

Petitioners, attempting to split their claim or cause of action, filed virtually identical complaints in both cases, even to the alleged damages incurred. In Federal Action they chose to seek a remedy only under the Bank Holding Company Act[40] and to assert remedies for alleged fraud and commercial unreasonableness in State Action. This is precisely what res judicata, collateral estoppel and impermissible relitigation prohibit. Since petitioners could have asserted remedies for fraud and commercial unreasonableness in the Federal Action, but chose not to; and since—even if the causes of action had been different—collateral estoppel bars relitigation of the issues of

---

[39] "Under this approach causes of actions are the same if they arise from the same 'transaction'; whether they are products of the same 'transaction' is to be determined by 'giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.' "

Moreover, this Court there noted with approval the earlier test in *Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 320:

> " ' "[A] party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible." ' "

[40] 12 U.S.C. 1972-1975 ("BHCA")

promise to lend and commercial unreasonableness[41] which were decided on the merits in Federal Action, they may not relitigate these matters in State Action. Injunctions under § 2283 empower federal courts to prevent such tactics in order to protect and effectuate their earlier federal judgments, and safeguard to the victors the fruits of their victory.

Federal appellate courts have repeatedly held that 28 U.S.C. § 2283 is expressly designed to prevent the kind of relitigation attempted by petitioners in State Action.[42] For example, in *Woods Exploration & Pro. Co. v. Aluminum Co. of Amer.*, 438 F.2d 1286 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972), the court held that the district court, after granting the federal defendants' motion for judgment n.o.v., properly en-

---

[41] The following argument of Parsons counsel to the jury at the close of the Federal Action belies a contention now that the issue of "commercial unreasonableness" was not litigated in Federal Action:

> "[Mr. Orange] got the land, he got all of the assets, all of the coils. . . all of the equipment; everything out there. They shut out, effectively, the unsecured creditors. That is out, at this point. But they got a valuable piece of property, they get a good business; they get the Parsons' business. And they are going to tell you that Mr. Parsons benefited from this arrangement. They are going to try to tell you that Mr. Parsons actually dreamed this scheme up." (JA 198)

Significantly, the lawyer for Trustee argued in State Action:

> "Let me talk to you just briefly about the commercial unreasonableness...first thing in January, January 5, you got them figuring out how to walk away with all the goodies and leave the unsecured creditors and Parsons Montgomery out in the cold. . . . There was only one bidder there. One person, one buyer. It was all pre-arranged. It was done in secret. It was done in a hidden fashion. . . They handled it quietly. They say Jim Parsons waived notice, . . . they didn't want anybody else there. They were going to sell it to Michael Orange. They made that decision way back on the 10th or the 11th." (JA 330-331)

[42] See cases cited in n. 32, *supra*.

joined a pending state court action that was filed just prior to the federal action because the plaintiffs' claims in state court—state antitrust laws, willful misrepresentation, tortious interference with contract or advantageous business relationship and prevention of business expansion in violation of state law—could have been raised in the federal antitrust action under the doctrine of pendent jurisdiction.

The courts below relied on *Harper Plastics v. Amoco Chemicals,* 657 F.2d 939 (7th Cir. 1981) which is square and compelling support for the injunction. Petitioners' brief does not mention *Harper.* There Harper filed suit in federal court on antitrust grounds, and the action was dismissed for lack of jurisdiction and failure to state a claim. Pending the appeal of the dismissal of the federal action, Harper filed a complaint in state court based on the same conduct as that alleged in the federal action. The Seventh Circuit affirmed the district court's injunction against these state court proceedings, and held (657 F.2d at 945):

> "*[R]es judicata* operates to bar litigation of matters that should have been raised in the prior proceeding. The prior judgment is conclusive 'not only in respect of every matter which was actually offered and received to sustain the demand or to make out a defense, but also as to every ground of recovery or defense which might have been presented.' ... This application of the doctrine of *res judicata* operates to prevent the splitting of a single cause of action and the use of several grounds for recovery under the same action as the basis for separate suits.... An unsuccessful party may not, therefore, frustrate the doctrine of *res judicata* by cloaking the same cause of action in the language of a theory of recovery untried in the previous litigation."
>
> * * * *
>
> "...[A]ppellant had an ample opportunity to advance its several theories of relief in its federal pleading. It elected

not to do so at its own peril, and cannot now argue that there are as many causes of action arising out of the transaction as there are conceivably relevant theories of relief."

The *Harper* court noted that the facts alleged in the state complaint were the same as those alleged in the federal complaint—precisely the situation now before this Court—and held that the federal court plaintiff had a duty to assert any possible state law claims.[43]

Petitioners make the curious argument that their ability to join state law claims in Federal Action was "highly questionable." (Bf., p. 25, n. 18) Surely petitioners do not suggest that the citizenship of additional parties, such as Trustee, Orange, or Herbert, would have defeated federal jurisdiction in the BHCA case, where jurisdiction was based on that federal statute, and not on diversity. The complete answer, whatever their argument, is contained in several cases brought and decided under the same provisions of BHCA which petitioners pursued. Those plaintiffs sought BHCA and state remedies in one

---

[43] (657 F.2d at 945-946):

"Here, there was one set of facts alleged in both pleadings, describing a transaction before the sale of F.L.W. Because the Robinson-Patman Act and the law of contracts in the State of Illinois merely provided separate grounds for relief in a single cause of action, appellant would ordinarily be expected to bring both remedies together in a single proceeding. It therefore appears that the exercise of pendent jurisdiction would have been appropriate in this case.

"We fail to discern the unfairness in requiring a plaintiff to join all relevant theories of relief in a single proceeding. The uncertainty over whether a trial judge would exercise pendent jurisdiction does not justify permitting the institution of a multiplicity of proceedings which may have the effect of harassing defendants and wasting judicial resources. If appellant entertained any doubts at the pleading stage, they should have been resolved in favor of joinder."

federal action against those banks and other natural and artificial persons, including residents of the states in which those federal actions had been brought. *Tose v. First Pennsylvania Bank,* 648 F.2d 879, 898 (3rd Cir. 1981), cert. denied 454 U.S. 893, (state law claims for intentional interference with business under state law); *Duryea v. Third Northwestern Nat'l Bank of Minneapolis,* 606 F.2d 823, 824 (8th Cir. 1979) (state antitrust law, common law fraud, unjust enrichment, state blue sky law); *Clark v. United Bank of Denver,* 480 F.2d 235, 237 (10th Cir. 1973), cert. denied, 414 U.S. 1004 (breach of fiduciary duty, fraud, unfair competition and breach of warranty.)

III.

The Trustee In Bankruptcy Of Subsidiary Was Correctly Enjoined.

Although the petition impermissibly seeks to raise for the first time a due process argument based on alleged unauthorized representation of the Trustee in the federal action,[44] the argument itself has no merit. The court below, as the district court, held that as to facts relating to BHCA and fraud claims, "the Trustee is in privity with the Parsons as to the adjudication of those facts and is bound by the federal adjudication of those matters."[45] See *Montana v. United States,* 440 U.S. 147. The court below remanded to give the Trustee an opportunity to convince the district court that his UCC claim was not based on the same alleged improprieties; and the Trustee was unable to do so.[46] Indeed, a case cited by petitioners, *General Foods v.*

---

[44] Issues never adequately alleged and considered below are not before this Court. *Tennessee v. Dunlap,* 426 U.S. 312, 314, n. 2; *Capital Cities Cables v. Crisp,* 467 U.S. ____, 81 L.Ed.2d 580, 588; and *California v. Taylor,* 353 U.S. 553, 557, n. 2.

[45] 747 F.2d at 1380; A-25.

[46] District court orders of March 29 and May 21, 1985, JA 344-356.

Mass. Dept. of Health, 648 F.2d 784, 787 (1st Cir. 1981), enunciates the appropriate test that due process permits a non party to be bound by a judgment if "he had directly or vicariously a full and fair opportunity to present evidence and argument." Petitioners' other cases (Bf., pp. 32-35) apply the test and also hold questions of privity and adequate representation to be fact issues.

The Trustee's knowing election to stay out of Federal Action is reason enough to bar him from seeking to litigate elsewhere issues which were in fact litigated in Federal Action—commercial unreasonableness and state law fraud (collateral estoppel); and matters which were not, but which could have been determined in Federal Action which involved the same cause of action as State Action (res judicata).[47]

Although Petitioners' brief ignores the authorities, the courts below followed and quoted extensively from *In re Four Corners Enterprises,* 17 B.R. 156 (M.D. Tenn. 1982) and *Paradise v. Vogtlandische Maschinen-Fabrik,* 99 F.2d 53, 55 (3rd Cir. 1939); and, because of the foregoing circumstances, the court below rejected the Trustee's contention that he had not had a

---

[47] Trustee's attorney was present and had an opportunity to participate in 15 pretrial depositions taken for both Federal and State Actions. (J.A. 368-397) This circumstance supports the finding of the court below (747 F.2d at 1379; A-23): "The Trustee was aware of the federal court proceeding and was free to intervene on the bankrupt corporation's behalf. Instead, he declined to get involved because he felt the suit was frivolous and would be a waste of money for the unsecured creditors he represents." The Trustee knew the allegations of the complaint in Federal Action. It is incredible that petitioners assert: "There is simply no evidence...to support the...contention that the Trustee made a conscious decision to refrain from joining the Federal Action." (Bf., p. 36)

full and fair opportunity to litigate in Federal Action and had not been adequately represented there.[48]

Moreover, Trustee was in fact adequately represented in Federal Action; is in privity with the other petitioners; and bound as they are by the results of Federal Action as to matters which were raised and decided and as to matters which were not, but could have been. *Nevada v. United States,* 462 U.S. 1104, ____, 77 L.Ed.2d 509, 524.[49]

---

[48] The court below there stated (747 F.2d at 1379; A-22):

" 'The trustee was well aware of these proceedings (the prior federal action) and made no effort to intervene as an interested party. *** Under these circumstances, the trustee cannot complain that he lacked a full and fair opportunity to litigate the issue in question at the federal district court proceeding. Collateral estoppel thus precludes the trustee from relitigating this issue.' *Four Corners, supra,* at 160."

[49] "Simply put, the doctrine of res judicata provides that when a final judgment has been entered on the merits of a case, [i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell v. County of Sac,* 94 US 351, 352:..."

See, also, Southwest Airlines Co. v. Texas, 546 F.2d 84, 94-95 (5th Cir. 1977):

"[F]ederal courts have repeatedly held that judgments can bind persons not party to the litigation in question.

* * * *

"Federal courts have deemed several types of relationships 'sufficiently close' to justify preclusion. First, a nonparty who has succeeded to a party's interest in property is bound by any prior judgments against the party. (Cit.) Second, a nonparty who controlled the original suit will be bound by the resulting judgment.

Certainly, Parsons-Montgomery and its Trustee were adequately represented in the prior litigation. Its parent corporation, Parsons-Mobile, and the holders of 99% of the stock of the parent, were parties in Federal Action.[50] Trustee joined in the pleadings of the other plaintiffs, and throughout State Action, took positions in that case consistent with the individual Parsons and Parsons-Mobile.

Repeatedly, and in numerous forms, petitioners argue that disparate interests among the Parsons, the parent corporation and the bankrupt subsidiary militate against the application of res judicata and collateral estoppel. Petitioners even go so far as to assert that intervention and ultimate victory in Federal Action would have accomplished nothing of benefit to the bankrupt subsidiary. (Bf., pp. 33 and 38) This is nonsense. Surely petitioners do not contend that parent Parsons corporation, asking for $2,419,945.89 for diminution of the value of its stock in the bankrupt subsidiary, was entitled to one recovery of

---

(Cit.) Third, federal courts will bind a nonparty whose interests were represented adequately by a party in the original suit." (Cit. omitted)

Aerojet-General Corp. v. Askew, 511 F.2d 710, 719-20 (5th Cir. 1975):

"Under the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative....
The question whether a party's interests in a case are virtually representative of the interests of a nonparty is one of fact for the trial court. (Cit.)" (Emphasis supplied.)

[50] See *Kreager v. General Electric,* 497 F.2d 468 (2nd Cir. 1974), *cert. denied* 419 U.S. 61, which held that the sole stockholder of a corporation was bound by the dismissal of an earlier action brought in the name of his corporation.

this sum for damages arising out of the commercially unreasonable sale of the assets of subsidiary; and that the Trustee of the bankrupt subsidiary would be entitled to another identical recovery on behalf of the subsidiary. The court below correctly held that the damages sought against Bank in Federal Action specifically involved alleged damages to the wholly owned subsidiary as a proximate result of the alleged dealings between Bank and its debtor, the subsidiary; and indeed, that the bankrupt subsidiary, and thus its Trustee, "was the primary, if not sole, party damaged by the alleged violation of the Bank Holding Company Action."[51]

Indeed, there are litmus tests that Trustee and his State Action lawyers considered representation by the Parsons and their lawyers to be completely adequate. The witness list submitted by Trustee in State Action[52] not only specifies all persons who testified in Federal Action and in depositions taken in that action, but as to the very State Action, Trustee designated "any witness listed by co-plaintiffs [Parsons in State Action]." In argument to the jury, counsel for Trustee adopted the arguments of attorneys for the Parsons.[53] They have even filed joint papers in this Court.

---

[51] District court opinion, A 40-41 of petition.

[52] Plaintiff's Exhibit 4 (J.A. 186).

[53] In his opening statement to the jury in State Action, an argument comprising one transcribed page, counsel for Trustee, "in the interest of time" adopted Parsons' counsel's "statement of what we expect the evidence to show." (JA 338) In his closing argument to the jury, counsel for Trustee stated: "I come to you behind [counsel for Parsons] who has stated the evidence to you as I have seen it." (JA 339) And see n. 41, *supra,* which compares the Parsons' jury argument in Federal Action with Trustee's jury argument in State Action. Both asserted rights on behalf of unsecured creditors.

The Parsons and their parent corporation—owners of all proprietary interest in a subsidiary said to have been injured by Bank—adequately represented the interests of the subsidiary in the federal action—"primary if not sole" interests alleged to have been damaged by the acts and omissions of Bank. In the language of *General Foods v. Mass. Dept. of Public Health, supra,* (p. 41), Trustee "had directly or vicariously a full and fair opportunity to present evidence and argument."

One would never know from reading petitioners' brief that Trustee has had a second opportunity to demonstrate that he sought to litigate in state court matters which were not litigated or could not have been litigated in Federal Action. The district court, in its order after remand of March 29, 1985 — after a painstaking comparison of pleadings, contentions and jury arguments in Federal and State Actions—concluded:

> "His claims of impropriety relate to .... failure to do those things prior to the sale which allegedly would have produced a fair price for the property sold. All of those matters have been litigated, and the Court of Appeals has affirmed a judgment for the defendant thereon. The Trustee, being in privy with the plaintiffs in that case, is bound by the proceeding."[54]

Epilogue

Respondents did not bring the federal case. Bank was sued there by the Parsons petitioners and Trustee deliberately chose to stay away. Dissatisfied with federal results, petitioners then attempted to relitigate in state court what was or could have been litigated in the federal action. The courts below correctly refused to countenance such tactics; enjoined further state pro-

---

[54] A-9 from respondents' opposition; JA 351.

ceedings; and thus furthered the congressional purpose of § 2283.[55]

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the writ of certiorari should be dismissed as improvidently granted; alternatively that the decision and judgment below should be affirmed.

Respectfully submitted,

M. ROLAND NACHMAN, JR.
P. O. Box 668
Montgomery, Alabama 36101

Counsel of Record for Respondents

---

[55] Noteworthy is *Donelon v. New Orleans Co.*, 474 F.2d 1108, 1114 (5th Cir. 1973):

> "[W]e cannot ignore the fact that here it was the [appellants] themselves who invoked the jurisdiction of the federal court.... Appellants themselves issued the invitations to dance in the federal ballroom, they chose their dancing partners, and at their own request they were assigned a federal judge as their choreographer. Now that the dance is over, appellants find themselves unhappy with the judging of the contest. They urge us to reverse and declare that 'Good Night Ladies' should have been played without...the preliminary injunction having been issued. This we have declined to do...."

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Brief of Respondents upon counsel of record for Petitioners by depositing a copy in the United States mail, postage prepaid, addressed as follows:

Mr. Frank Wilson
Beasley & Wilson
418 South Hull Street
Montgomery, AL 36104

Mr. James Jerry Wood
641 South Lawrence Street
Montgomery, AL 36104

This _____ day of August, 1985.

M. Roland Nachman, Jr.

APPENDIX

EXHIBIT A

COMPARISON OF CORRESPONDING PARAGRAPHS OF STATE AND FEDERAL COMPLAINT

State Complaint	Federal Complaint
12. For a substantial period of time prior to November 30, 1978, "First Alabama" loaned "Industries" a considerable amount of money for operating and other purposes in its business. "Industries" in turn executed security agreements to "First Alabama" on certain personal property and assets over the life in connection with said loans. At no time prior to November 30, 1978, did "Industries" refuse to pay or fail to pay any of its indebtedness to "First Alabama." During the life of said loans "First Alabama," acting by and through its agents, servants, or employees, including "Herbert," advised and consulted with "Industries" in its business operation and management. "Herbert" personally took over the handling of said loans on a date prior to November 30 in the year 1978 due to the fact that the employee of the bank handling the loans left the employ-	12. For a substantial period of time prior to November 30, 1978, Defendant loaned Subsidiary a considerable amount of money for operating and other purposes in its business. Subsidiary, in turn, executed security agreements to Defendant on certain personal property and assets over the life in connection with said loans. At no time prior to November 30, 1978, did Subsidiary refuse to pay, or fail to pay, any of its indebtedness to Defendant. During the life of said loans, Defendant, acting by and through its agents, servants, or employees, advised and consulted with Subsidiary in its business operation and management. A Senior Vice President, Edward Herbert, personally took over the handling of said loans on a date prior to November 30, 1978, due to the fact that the employee of the bank handling the loans left the employment of Defendant. Subsequent to said date, Mr.

State Complaint	Federal Complaint
ment of "First Alabama." Subsequent to said date, "Herbert" advised and counselled with "Parsons" concerning the operation and management of "Industries."	Herbert advised and counselled with Subsidiary concerning the operation and management of Subsidiary.
14. On a later date and prior to November 30, 1978, "Herbert" again approached "Parsons" with a request that he enter into negotiations with another prospective purchaser, namely, "Orange." Shortly thereafter "Orange" came to "Industries' " location and looked over the operation. "Orange" later indicated to "Parsons" that he was not interested in purchasing the business, but planned to take over the management of "Industries" at the request and under the direction of "First Alabama" and "Herbert."	13. On a date prior to November 30, 1978, Defendant acting by and through its officer, agent, and employee, Herbert, approached Subsidiary with a request that negotiations be undertaken by Subsidiary with a prospective purchaser, namely Michael Orange. Shortly thereafter, Mr. Orange came to Subsidiary's business location and looked over the operation. Mr. Orange later indicated to Subsidiary that he was not interested in purchasing the business, but planned to take over the management of the company at the request and under the direction of Defendant.
13. Subsequent to the events alleged in paragraph 14, a local attorney, namely Samuel Kaufman, at the direction of "Herbert" and "Orange" was	14. Subsequent to the events alleged in paragraph 13 above, a local attorney, namely Samuel Kaufman, at the direction of Defendant and Mr.

State Complaint	Federal Complaint
employed to represent "Industries" to bring about a proposed composition of creditors. "Herbert" instructed "Parsons" to secure a certified audit of the assets and liabilities of "Industries" for distribution to all creditors of "Industries." "Parsons" then employed Vilas V. Vawtar and Associates, P.C., Certified Public Accountants, to comply with "Herbert's" instructions. The work was completed by the accounting firm during the period November 27-28, 1978, and the information made available to the bookkeeper regularly employed by "Industries." A balance sheet on "Industries" was subsequently prepared as of November 30, 1978, by said bookkeeper, using the information supplied by the accounting firm and transmitted to "Orange." This balance sheet showed, as of November 30, 1978, total assets of $2,384,945.89 with total liabilities of $1,910,747.09. "Orange" and "Herbert" refused to use this information and instead supplied information to Kaufman reducing the total assets of "Industries" from $2,384,945.89 to $1,034,000.00	Orange, was employed to represent Subsidiary to bring about a proposed composition of creditors. Defendant instructed Subsidiary to secure a certified audit of the assets and liabilities of the company for distribution to all of its creditors. Subsidiary had employed Vilas V. Vawtar and Associates, P.C., Certified Public Accountants, to comply with Defendant's instructions. The work was completed by the accounting firm during the period November 27-28, 1978, and the information made available to the bookkeeper regularly employed by Subsidiary. A balance sheet on Subsidiary was subsequently prepared as of November 30, 1978, by said bookkeeper, using the information supplied by the accounting firm and transmitted to Mr. Orange. This balance sheet showed, as of November 30, 1978, total assets of $2,384,945.89 with total liabilities of $1,910,747.09. Mr. Orange and Mr. Herbert refused to use this information and instead supplied information to Attorney Kaufman reducing the total assets of Subsidiary from $2,384,945.89 to $1,034,000.00

State Complaint	Federal Complaint
16. On or about December 14, 1978, "Orange" became Chief Executive Officer of "Industries" on the direct insistance of "First Alabama" and "Herbert." At said time, at the request of "Herbert," "Parsons" resigned as President of "Industries."	15. On or about December 14, 1978, Mr. Orange became Chief Executive Officer of Subsidiary on the direct insistance of Defendant, as a condition of Defendant's renewing Subsidiary's loans and extending operating loans, letters of credit, etc., in the future. At the request of Defendant, Jim D. Parsons resigned as President of Subsidiary as a further condition of credit by Defendant.
17. There was no significant change in the assets or inventory maintained by "Industries," nor in the liabilities of said company from November 27, 1978 to January 17, 1979.	16. There was not significant change in the assets or inventory maintained by Subsidiary nor in the liabilities of said company from November 27, 1978 to January 17, 1979.
18. Attorney Kaufman, at the request of "Orange" and "Herbert," sent a letter to all creditors of "Industries" dated December 21, 1978, which in effect proposed a common law composition of creditors. This proposal was conceived by "Orange" with the overt concurrence of "Herbert." The proposal, mailed to all creditors, listed	17. Attorney Kaufman, at the request of Mr. Orange and Defendant sent a letter to all creditors of Subsidiary dated December 21, 1978, which in effect proposed a common law composition of creditors. This proposal was conceived by Mr. Orange and Defendant. The proposal, mailed to all creditors, listed the assets of Subsidiary as "approximately

State Complaint

the assets of "Industries" at "approximately $1,034,000.00" with liabilities of "approximately $1,948,000.00" and with a negative net worth of "approximately $914,000.00." The proposal stated that it was prepared by the management of "Industries," and stated further that "First Alabama" held a secured position as against all creditors to the extent of $1,200,000.00. The proposal stated further that "First Alabama" had refused to continue to carry "Industries' " loans unless "Industries" brought in new management, and further that "First Alabama" located "Orange" to fill this newly created management role. The proposal stated further that "First Alabama" conditioned restructuring of the existing debt of "Industries" upon acceptance of "Orange" to assume the position of President and Chief Executive Officer of "Industries" and that "Orange" had already assumed the management of "Industries." The proposal stated further that "Parsons" had resigned as President and

Federal Complaint

$1,034,000.00" with liabilities of "approximately $1,948,000.00" and with a negative net worth of "approximately $914,000.00." The proposal stated that it was prepared by the management of Subsidiary, and stated further that Defendant held a secured position as against all creditors to the extent of $1,200,000.00. The proposal stated further that Defendant had refused to continue to carry Subsidiary's loans unless Subsidiary brought in new management, and further that Defendant located Mr. Orange to fill this newly created management role. The proposal stated further that Defendant conditioned restructuring of the existing debt of Subsidiary upon acceptance of Mr. Orange by Subsidiary to assume the position of President and Chief Executive Officer of Subsidiary, and that Mr. Orange had already assumed the management of Subsidiary. The proposal stated further that Jim D. Parsons had resigned as President and Chief Executive Officer of Subsidiary and that Mr.

State Complaint	Federal Complaint
Chief Executive Officer of "Industries" and that "Orange" had replaced him, and further, that "Parsons' " salary had been reduced by 50 percent and that he would continue to work with the company as Sales Manager under the direction and control of "Orange."	Orange had replaced him, and further, that Jim D. Parsons' salary had been reduced by 50 percent and that Mr. Orange would have full direction and control over Subsidiary.
19. The above proposal stated that "Industries" had a basically sound organization with buildings, machinery, and equipment in good condition. It stated further that "Industries" could sustain a shipping volume increase from the present $3 million of annual sales to more than $5 million without any significant capital expenditures and the manufacturing and administrative costs were reasonable. It stated further that the "new management" believed the company could show an operating profit for 1979.	18. The above proposal stated that Subsidiary had a basically sound organization with buildings, machinery, and equipment in good condition. It stated further that Subsidiary could sustain a shipping volume increase from the present $3 million of annual sales to more than $5 million without any significant capital expenditures and that manufacturing and administrative costs were reasonable. It stated further that the "new management" believed the company could show an operating profit for 1979.
20. The furnishing of a fraudulent and highly misleading statement of the assets, liabilities, and net worth of "Industries" to its	19. The furnishing of a fraudulent and highly misleading statement of the assets, liabilities, and net worth of Subsidiary to its

State Complaint

creditors, knowing the same to be false and misleading in several respects, portrayed an entirely different picture to the creditors than that which actually existed on November 30, 1978, and on the date of the proposal, viz., December 21, 1978.

21. A relatively small number of the creditors of "Industries" accepted the proposal submitted to them. At no time did "Parsons," or any employee, officer or director of "Industries," with the exception of "Orange," agree to the proposed composition of creditors, nor the approach taken. In fact, "Parsons" repeatedly told "Orange" and "Herbert" that it would not work and would be a financial disaster for "Industries" and that the creditors simply wouldn't buy the proposal. "Orange" and "Herbert" refused to listen to "Parsons" and placed him him in a subordinate position in the operation and management of the company as shown by the Kaufman proposal and the actual day-to-day operations at the plant site and otherwise.

Federal Complaint

creditors, by Defendant and Mr. Orange, knowing the same to be false and misleading in several respects, portrayed an entirely different picture to the creditors than that which actually existed on November 30, 1978, and on the date of the proposal, viz., December 21, 1978. A relatively small number of the creditors of Subsidiary accepted the proposal submitted to them. At no time did Parent agree to the proposed composition of creditors, nor the approach taken. In fact, Jim D. Parsons repeatedly told Mr. Orange and Mr. Herbert that it would not work and would be a financial disaster for Subsidiary, and that the creditors simply wouldn't buy the proposal. Mr. Orange and Mr. Herbert placed Jim D. Parsons in a subordinate position in the operation and management of Subsidiary, as shown by the Kaufman proposal and the actual day-to-day operations at the plant site and otherwise. Defendant, acting by and through its officer, agent, and employee Mr. Herbert, because of its posi-

State Complaint	Federal Complaint
The Defendant "First Alabama," acting by and through its officer, agent, and employee "Herbert," because of its position, exercised almost total control over "Parsons" and "Industries" at this time.	tion of power, exercised total control over Subsidiary at this time.
22. The information supplied by Attorney Kaufman, at the request and under the direction of "Orange" and "Herbert," and subsequently mailed to all creditors of "Industries," was false and misleading in several material and pertinent facts as set out herein. Said proposal substantially mistated the financial condition of "Industries" to the creditors. Defendants "Orange" and "Herbert," individually, and as an officer, agent, or servant of "First Alabama," knew the information supplied to creditors to be false and misleading, and, by their active participation in the preparation and dissemination of same to creditors, knowingly misled said creditors to the actual detriment of the creditors and Plaintiffs.	20. The information supplied by Attorney Kaufman, at the request and under the direction of Mr. Orange and Mr. Herbert, and subsequently mailed to all creditors of Subsidiary, was false and misleading in several material and pertinent facts as set out herein. Said proposal substantially mistated the financial condition of Subsidiary to the creditors. Defendant knew the information supplied to creditors to be false and misleading, and, by its active participation in the preparation and dissemination of same to creditors, knowingly misled said creditors to the actual detriment of the creditors and Plaintiffs.

State Complaint	Federal Complaint
23. On a date in January of 1979, prior to January 9, when it became evident that the creditors would not accept the proposed composition, "Herbert" advised "Parsons" in a private conversation that the Bank would no longer finance the business operations of "Industries," nor would "Industries" be given additional time to secure other financing from other sources. On or about January 9, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that all of the indebtedness of "Industries" would be due and payable on January 15, 1979, and that no additional time would be given to said company. The amount of the total indebtedness owed by "Industries" was stated to be $1,076,486.00 in principal with $33,925.13 interest as of said date.	21. On January 9, 1979, Defendant advised Jim D. Parsons that Defendant would no longer finance the business operations of Subsidiary, nor would Subsidiary be given additional time to secure other financing from other sources. On or about January 9, 1979, Defendant notified Subsidiary that all of its indebtedness to Defendant, stated as $1,076,486.00 in principal with $33,925.13 interest, would be due and payable on January 15, 1979, and that no additional time would be given to said company.
24. On or about January 11, 1979, "Orange" notified "Parsons" in writing that he was rescinding their agreement and that his working with "Industries" was not serving any purpose, which in effect gave notice that "Orange" would "cancel" his agreement with	22. On or about January 11, 1979, Mr. Orange notified Jim D. Parsons that he (Mr. Orange) would "cancel" his agreement with Subsidiary (his resignation required six months to take effect) and, thus, resign as Chief Executive Officer.

State Complaint	Federal Complaint
"Industries" which required six months to take effect and, thus, resign as Chief Executive Officer at the expiration of the stated time.	
25. On or about January 15, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that all assets secured under the security agreements were being taken in and that physical possession would be taken by "First Alabama" on said date.	23. On or about January 15, 1979, Defendant notified Subsidiary that all assets secured under the security agreements were being taken in and that physical possession would be taken by Defendant on said date. On or about January 15, 1979, Defendant notified Subsidiary that Defendant would sell all collateral security to satisfy the aforesaid loans at Mr. Herbert's office on January 17, 1979 at 2:00 p.m.
26. On or about January 15, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that "First Alabama" would sell all collateral security to satisfy the aforesaid loans at "Herbert's" office on January 17, 1979, at 2:00 p.m.	
27. On or about January 17, 1979, a private sale of the assets of "Industries" was made by "First Alabama" to "OSI," at 10:00 a.m. (two hours prior to the notice time), which purported to convey all rights and title in and to the said property and assets for a sales price of $907,000.00. A bill of sale was executed and	24. On or about January 17, 1979, a private sale of the assets of Subsidiary was made by Defendant to OSI, Inc., at 10:00 a.m. (four hours prior to the notice time), which purported to convey all rights and title in and to the said property and assets for a sales price of $907,000.00. A bill of sale was executed and delivered by

State Complaint	Federal Complaint
delivered by "First Alabama" to "OSI" on January 17, 1979, at 10:10 a.m., purportedly conveying for the consideration of $907,252.65 certain described personal property of "Industries."	Defendant to OSI, Inc. on January 17, 1979, at 10:10 a.m., purportedly conveying for the consideration of $907,352.65 certain described personal property of Subsidiary.
28. At all material times in 1978, and specifically from November 30, 1978, to January 17, 1979, "Herbert" and "Orange" were working in concert to acquire the business owned and operated by "Industries" in Montgomery County, Alabama for "Orange." The methods by which "Orange" took possession and obtained title to the assets and properties of "Industries" could never have happened as it did without the active participation and assistance of "Herbert," an officer, agent, and employee of "First Alabama."	25. At all material times in 1978, and specifically from November 30, 1978, to January 17, 1979, Mr. Herbert and Mr. Orange were working in concert to acquire the business owned and operated by Subsidiary in Montgomery County, Alabama for Mr. Orange. The methods by which Mr. Orange took possession and obtained title to the assets and properties of Subsidiary could never have happened as it did without the active participation and assistance of Mr. Herbert, a key officer, agent, and employee of Defendant.
29. The relationship between "Herbert" and "First Alabama" was, at all times pertinent hereto, that of agent and principal; the relationship between "First Alabama" and "Industries" was, at all times pertinent hereto, much more than that of banking institu-	26. The relationship between Mr. Herbert and Defendant was, at all times pertinent hereto, that of agent and principal; the relationship between Defendant and Subsidiary was, at all times pertinent hereto, much more than that

State Complaint	Federal Complaint
tion and regular customer, the exact relationship being one of trust as described herein; the relationship between "Orange" and "Industries" as of December 14, 1978 to the present and certainly at the time of his letter dated January 11, 1979, giving notice of his intended resignation (which required six months to take effect) was that of Chief Executive Officer and employer and/or agent and principal. Both "Herbert" and "Orange" owed certain duties and responsibilites to their respective employers, the stockholders of both "First Alabama" and "Industries," and to all parties Plaintiff hereto. Their special relationship with "Industries" provided them with certain valuable confidential and insider-type information that only a person in their respective positions could have obtained concerning the operations of the business of "Industries," its assets and liabilities, its customers and contacts, and other information which could later be used to their mutual advantage.	of banking institution and regular customer, the exact relationship being one of trust as described herein; the relationship between Mr. Orange and Subsidiary as of December 14, 1978 to the present and certainly at the time of his letter dated January 11, 1979, giving notice of his intended resignation (which required six months to take effect) was that of Chief Executive Officer and employer and or agent and principal. The special relationship of Mr. Herbert and Mr. Orange with Subsidiary provided them with certain valuable confidential and insider-type information that only persons in their respective positions could have obtained concerning the operations of the business of Subsidiary, its assets and liabilities, its customers and contacts, and other information which could later be used to their mutual advantage.

State Complaint

30. The sale of the assets of "Industries" to "OSI," a corporation newly created in January of 1979, for the sole purpose of obtaining the assets and properties of "Industries," was not handled in a commercially reasonable manner, in that acquisition and sale of a highly complicated and complex manufacturing firm was completely transacted in less than two days with the price paid by "OSI" being substantially less than the market value of the assets and properties purported to be sold. In addition thereto, no given an opportunity to inspect the properties and submit bids. Said sale was not handled in conformity with reasonable commercial practices, nor was the property and assets sold for the fair market value thereof. The letter from "Herbert," on behalf of "First Alabama," dated January 15, 1979, to "Parsons" giving notice of the aforesaid private sale actually gave notice of sale to "Standard Steel Building Systems, Inc." and not of a sale to "OSI." This notice was given and received by the parties

Federal Complaint

27. The sale of the assets of Subsidiary by Defendant to OSI, Inc., a corporation newly created in January of 1979, for the sole purpose of obtaining the assets and properties of Subsidiary, was not handled in a commercially reasonable manner, in that acquisition and sale of a highly complicated and complex manufacturing firm was completely transacted in less than two days with the price paid by OSI being substantially less than the market value of the assets and properties purported to be sold. In addition thereto, no additional persons or firms, who could have been purchasers, were given an opportunity to inspect the properties and submit bids. Said sale was not handled in conformity with reasonable commercial practices, nor were the property and assets sold for the fair market value thereof.

State Complaint	Federal Complaint
thereto on January 15, 1979. At said date, "Parsons" was required by "Herbert" to sign a letter which had been prepared by "Herbert" (or at his discretion) which was explained by "Herbert" and purported to be a Waiver of Notice.	
31. On or about the 2nd day of January, 1979, and at all times thereafter, "Herbert" put great pressure on "Parsons" to require "Industries" to either (a) pay the indebtedness in full or (b) put "First Alabama" in possession of the assets and properties of "Industries" which would have put "Industries" out of business. At no time prior to said date had "Herbert," nor any other person on behalf of "First Alabama," given any indication that "First Alabama" would discontinue financial arrangements with "Industries" and/or "Parsons." In fact, "Parsons" had been led to believe that "First Alabama" would renew all of said loans and continue to finance "Industries" operations.	28. On or about the 2nd day of January, 1979, and at all material times thereafter, Defendant put great pressure on Subsidiary to require Subsidiary to either (a) pay the indebtedness in full or (b) put Defendant in possession of the assets and properties of Subsidiary which would have put the corporation out of business. At no time prior to said date had Defendant given any indication that it would discontinue financial arrangements with Subsidiary. In fact, Jim D. Parsons had been led to believe that Defendant would renew all of said loans and continue to finance the corporation's operations. Defendant made many unsecured loans to Jim D. Parsons at interest rates as low as 5% just prior to the above takeover.

State Complaint	Federal Complaint
32. The Defendant "First Alabama," acting by and through its officers, agents, or employees, including "Herbert," the Defendant "Herbert," individually, and as an officer, agent, or employee of "First Alabama," the Defendant "OSI," acting by and through its officers, agents, or employees, including "Orange," the Defendant "Orange" acting individually and as an officer, agent, or employee of "OSI," actively participated in the scheme described hereinabove to take over the operation of the business affairs of "Industries," including its assets and properties which amounted to collusion between said Defendants to do great damage and economic harm to Plaintiffs and which effectively put "Industries" out of business for all practical purposes.	29. Defendant, acting by and through its officers, agents, or employees, including Mr. Herbert, actively participated in the scheme described hereinabove to take over the operation of the business affairs of Subsidiary including its assets and properties which amounted to collusion between said Defendant and others, including Mr. Orange, to do great damage and economic harm to Plaintiffs and which effectively put Subsidiary out of business.
36. Subsequently, "First Alabama," acting by and through "Herbert," took possession of the ongoing business operations of "Industries" as set out hereinabove, taking and selling all assets and properties of said corporation.	32. Subsequently, Defendant took possession of the ongoing business operations of Subsidiary as set out hereinabove, taking and selling all assets and properties of said corporation on January 17, 1979, at a private sale to OSI, Inc., a newly formed corporation.

Excerpts From Relief Sought:

State	Federal
38. As a direct and proximate result and consequence of the acts of the Defendants described hereinabove, the Plaintiffs, separately and severally, suffered and sustained the following damages:	40. As a direct and proximate result and consequence of the acts of the Defendant described hereinabove, which violated Title 12, U.S.C.A. § 1971, et seq., the Plaintiffs, separately and severally, suffered and sustained the following damages:
a. Plaintiffs, individually and separately, sustained great damage to their general reputation in the business community, which prior thereto had been good.	a. Plaintiffs, individually and separately, sustained great damage to their general reputation in the business community, which prior thereto had been good.
b. Plaintiffs "Industries" and "Steel" sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February which has expired, and they will suffer such losses in the future.	b. Plaintiff, Parent, sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February which has expired, and they will suffer such losses in the future; the value of its stock in Subsidiary was rendered worthless and of no value (Subsidiary had assets and properties valued at approximately $2,419,945.89 as of January 17, 1979).
c. Plaintiff "Industries" sustained the loss of all of its assets and properties taken and now claimed by "First Alabama" and/or "OSI" in the value of $2,419,945.89.	c. Plaintiff, Parent, has been greatly damaged in the
d. Plaintiff "Steel" sustained a severe loss due to the	

State Complaint

serious decline in its own sales and collections due to the problems associated with the aforesaid takeover of "Industries" by defendants.

e. Plaintiff "Steel," as a result of defendants acts and actions,, has been greatly damaged n the day-to-day operation of its own business in that it has received a great deal of bad publicity, has lost business and sales, has failed to receive payments when due from its customers on accounts receivable, was forced to pay over to defendant "First Alabama" as a result of its personal guarantee real property with an appraised market value in excess of $950,000.00 losing title to the real estate as described hereinabove.

f. Plaintiff "Parsons," has been caused great worry, stress, mental anguish, and has been harrassed by defendants since the 11th day of January, 1979, all to his great damage and detriment.

g. Plaintiff "Mrs. Parsons" has been caused great worry, stress, mental anguish,

Federal Complaint

day-to-day operation of its own business in that it has received a great deal of bad publicity, has lost business and sales, has failed to receive payments when due from its customers on account receivable; and, it was forced to pay over to Defendant as a result of its personal guarantee real property with an appraised market value of $1,003,000.00, losing title to the real estate as described hereinabove.

d. Plaintiff Jim D. Parsons, lost a good job, has been caused great worry, stress, mental anguish, and has been harrassed by Defendant since the 11th day of January, 1979, all to his great damage and detriment.

e. Plaintiff Melba L. Parsons has been caused great worry, stress, mental anguish, physical problems caused by worry, tension, and stress, and has been harrassed by Defendant since the 11th day of January, 1979, her stock in Parent has greatly diminshed in value, all to her great damage and detriment.

State Complaint	Federal Complaint
physical problems caused by worry, tension, and stress, and has been harrassed by defendants since the 11th day of January, 1979, all to her great damage and detriment.	
h. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.	f. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.

Supreme Court, U.S.
FILED
NOV 22 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1616

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PARSONS STEEL, INC., JIM D. PARSONS and MELBA L. PARSONS, and A. POPE GORDON, Trustee in Bankruptcy for the Estate of PARSONS STEEL INDUSTRIES, INC.,

Petitioners,

vs.

FIRST ALABAMA BANK OF MONTGOMERY, N. A., and EDWARD HERBERT,

Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

PETITIONERS' REPLY BRIEF

*JAMES JERRY WOOD
JAMES T. SASSER
WOOD AND PARNELL
641 S. Lawrence Street
Montgomery, AL 36101
(205) 832-4202

*Counsel of Record for Petitioner, A. Pope Gordon, Trustee in Bankruptcy for the Estate of Parsons Steel Industries, Inc.

FRANK M. WILSON
BEASLEY AND WILSON
418 South Hull Street
Montgomery, AL 36104
(205) 269-[illegible]3

Counsel of Record for Petitioners, Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Argument	1
I. The District Court Erred In Refusing To Give Full Faith And Credit To The State Court Judgment	1
II. The District Court Erred In Enjoining A Pending State Court Proceeding	4
A. No Issue Actually Litigated In The Federal Judgment Was Repeated In The State Action	4
B. The Courts Below Improperly Applied The Anti-Injunction Act	5
C. Principles Of Comity And Federalism Prohibit An Injunction In This Case	7
III. The District Court Erred In Enjoining The Trustee Who Was Not A Party To The Federal Action	8
Conclusion	10

TABLE OF AUTHORITIES

Page

Cases

Allen v. McCurry, 449 U.S. 90 (1980) 2, 3

Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) 6

First Alabama Bank v. Parsons Steel, et al., 747 F.2d 1367 (11th Cir. 1984) 2

Harper Plastics v. Amoco Chemical Corporation, 657 F.2d 939 (7th Cir. 1981) 6

Kremer v. Chemical Construction Corp., 456 U.S. 461, *reh. denied,* 458 U.S. 1133, (1982) 2

Mitchum v. Foster, 407 U.S. 225 (1972) 2, 6, 7

Montana v. United States, 440 U.S. 147 (1979) 5

Parsons Steel, Inc. v. First Alabama Bank, 679 F.2d 242 (11th Cir. 1982) 5

Toucey v. New York Life Insurance Company, 314 U.S. 118 (1947) 2, 6

Woods Exploration and Producing Company v. Aluminum Company of America, 438 F.2d 1286 (5th Cir. 1971) 5

Statutes

12 U.S.C. §1972, Bank Holding Company Act 4

12 U.S.C. §1971 4

12 U.S.C. §1975 4

28 U.S.C. §2283, Anti-Injunction Statute 5, 7, 8

28 U.S.C. §2254, Habeas Corpus Act 2

Other

Moore's Federal Practice and Procedure 7

The American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts, §1372, page 306 (1968) 7

No. 84-1616

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PARSONS STEEL, INC., JIM D. PARSONS and MELBA L. PARSONS, and A. POPE GORDON, Trustee in Bankruptcy for the Estate of PARSONS STEEL INDUSTRIES, INC.,

Petitioners,

vs.

FIRST ALABAMA BANK OF MONTGOMERY, N. A., and EDWARD HERBERT,

Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

PETITIONERS' REPLY BRIEF

ARGUMENT

I. The District Court Erred In Refusing To Give Full Faith And Credit To The State Court Judgment.

Bank and Herbert refuse to directly confront the most important issue presented: whether the district court erred in refusing to give full faith and credit to the state court judgment. Bank and Herbert do not deny - nor could they - that the preclusive effect to be given the earlier federal judgment was placed in issue and litigated on the merits in state court. The state court determined that the federal judgment did not preclude the State Action. (A.219, 220, 251). That determination was necessary to the final judgment rendered in state court.

The Court of Appeals attempted to legitimize the district court's refusal to give full faith and credit to the state court judgment by holding that the Anti-Injunction Act is an implied exception to the Full Faith and Credit Act. (747 F.2d at 1376. Pet. Cert. A.15) Bank and Herbert make no such argument here but attempt to characterize the issue as "simply irrelevant". (Respondent's brief p.25) It is no surprise Bank and Herbert attempt to ignore this issue because it can only be resolved against them and requires reversal of the district court's injunction.

The state court's resolution of the res judicata issue bound the federal district court in this case. The Full Faith and Credit Act absolutely requires that full faith and credit be given to a state court determination *unless* Congress in a later statute has "clearly manifested" its intent to repeal the Act. *Kremer v. Chemical Construction Corporation,* 456 U.S. 461, *reh. denied,* 458 U.S. 1133, (1982). *Allen v. McCurry,* 449 U.S. 90 (1980). Banks suggests no clear intent to repeal but instead recognizes that the most recent amendment to the Anti-Injunction Act was intended merely to "restore the basic law as generally understood and interpreted prior to the *Toucey* decision." (Respondent's brief p. 20) *Mitchum v. Foster,* 407 U.S. 225, 236 (1972). No case prior to *Toucey* held that a federal court need not give full faith and credit to a state court judgment in these circumstances. The *Toucey* decision did not consider that issue and neither did Justice Reed in dissent. The 1948 amendment is no authority for Bank's position that the Full Faith and Credit Act is "simply irrelevant".

When Congress enacted the Federal Habeas Corpus Act it intended to modify the operation of the Full Faith and Credit Act and plainly said so. *See,* 28 U.S.C. §2254. The Full Faith and Credit Act had been the law for many years when the 1948 amendment to the Anti-Injunction Act was enacted. Had Congress intended to create an exception to the Full Faith and Credit Act it would have clearly indicated that intent in the Statute or at least there would be some indication of that intent in the legislative history.

Bank advances the Court of Appeal's argument that the failure to recognize the Anti-Injunction Act as an implied exception to the Full Faith and Credit Act would require a party with a prior federal judgment "to rush back to federal court for a res judicata ruling any time there was a possibility that a state court might rule on the issue first." 747 F.2d 1376 (Pet. Cert. A.16).[1] As a matter of policy that result is certainly preferable to allowing a party - such as Bank here - to fully litigate its res judicata defense along with other defenses in state court before seeking an injunction in federal court. The latter interpretation both increases the conflict between co-existing equal court systems and fails to effect the policy of res judicata, that is, to avoid multiple resolution of the same issue.

Bank and Herbert also seem to suggest that the Full Faith and Credit Act does not apply because the state court in resolving the res judicata issue applied federal law. This Court has clearly held that a federal court must afford full faith and credit to a state court resolution of federal law even if it involves the interpretation of rights secured by the Constitution of the United States. *Allen v. McCurry,* 449 U.S. 90 (1980). Bank's logic here is twisted. The federal court is bound to give the same preclusive effect to the state court judgment (that the federal judgment did not bar the State Action) as would be given in state court. It makes no difference whether the state court applies state or federal law in reaching that judgment.

---

[1] As Judge Hill, in dissent, clearly shows the injunction could be sought at any time prior to a decision on the merits.

II. The District Court Erred In Enjoining A Pending State Court Proceeding.

A. No Issue Actually Litigated In The Federal Judgment Was Repeated In The State Action.

Bank and Herbert continue to argue that the Federal Action resolved certain issues of law and fact which were repeated in the State Action. Bank can not, however, reconcile that argument with the issues outlined in the pretrial order in the Federal Action.[2]

Counsel for Bank summarized the issues to be resolved in the Federal Action in his opening statement in that case:

> The act that we are concerned with here, the act of Congress, is what is called an anti-trust type statute. Now, the anti-trust laws for most businesses were passed many years ago, back at the later part of the last century, in the 1980's. And, essentially, what those laws were designed to do was to protect free competition so...that companies couldn't combine with each other to set prices to put other companies out of business, and to do other practices, among them, practices called tying arrangements. And this gets to the statute we are talking about regarding banks.
>
> * * *
>
> Now, in 1972 Congress said to banks, you cannot engage in tying arrangements.
>
> * * *

---

[2] Statement of Plaintiffs' Case: A. The Plaintiffs contend that the Defendant, a national banking association, violated Title 12 U.S.C. §1972, by placing certain requirements on Plaintiffs - the Defendant's customers - as conditions to making additional loans and extending credit to Parsons Steel Industries, Inc. These conditions were not of such nature as to be usually provided to a bank by a customer in connection with a loan. Plaintiffs were at the time customers of Defendant for the purposes of 12 U.S.C. §1971 et seq., and specifically §§1972 and 1975. (A.280).

> Now that is the kind of practice that we are talking about here. *That is the only kind of legal violation that is alleged here.*

(A.407-708). (Emphasis added).

There is simply no support whatsoever for Bank and Herbert's contention that either the issue of promise to lend or commercial reasonabieness was actually litigated in the Federal Action. That fact alone requires reversal of the injunction as to the Trustee in Bankruptcy, a non-party to the Federal Action, since collateral estoppel applies where non-parties are sought to be precluded. *Montana v. United States,* 440 U.S. 147, 154 (1979)

Bank does not deny that the preclusive effect of the federal judgment must be measured by the final judgment of the Court of Appeals, i.e., that, as a *matter of law* the allegations of Plaintiffs' complaint in the Federal Action did not constitute a violation of the Bank Holding Company Act. *Parsons Steel v. First Alabama Bank,* 679 F.2d 242, 244 (11th Cir. 1982). (Emphasis supplied). No issue of law or fact litigated in the State Action is implicated in that judgment.

B. The Courts Below Improperly Applied The Anti-Injunction Act.

Bank and Herbert suggest that limiting a §2283 injunction to issues actually decided by the earlier federal judgment would overturn "almost forty years of unbroken, and uniform interpretation of the congressional purpose when the 1948 relitigation exception was enacted as §2283." (Respondents' brief p.24). That is simply not true. In that forty year period only two courts have even suggested that §2283 allows an injunction of issues which were not but arguably "could have been" litigated in the earlier federal judgment. *See: Woods Exploration and Production Company v. Aluminum Company of America,* 438 F.2d 1286 (5th Cir. 1971), cert. denied 404 U.S.

1047; *Harper Plastics v. Amoco Chemical Corporation,* 657 F.2d 939 (7th Cir. 1981). More importantly all of the precedents cited by Bank and Herbert and the decisions of this Court teach that exceptions to the Act must be narrowly construed. *Mitchum v. Foster,* 407 U.S. 225 (1972). *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers,* 398 U.S. 281 (1970).

Bank places great emphasis on Justice Reed's dissent in *Toucey* and his suggestion that a federal judgment should be more than "only the basis for a plea of res judicata which is to be examined by another court, unfamiliar with the record already made, to determine *whether the issues were or were not settled by the former adjudication.*" (314 U.S. at 144) (Emphasis added). By suggesting that the federal court's decision would be what issues "were or were not settled" Justice Reed implies that an injunction should be limited to issues actually adjudicated.

Bank and Herbert's interpretation simply cannot be justified by the statute or its legislative history. The words "to protect or effectuate" indicate an intent to limit an injunction to a state court proceeding which could result in a decision inconsistent with the earlier federal judgment. That can only occur when the same issue is presented again in the state court proceeding.

No case prior to *Toucey* involved an injunction of issues which were not but arguably "could have been" litigated in a federal action. The injunction reversed in *Toucey* enjoined only isues actually litigated. The action of Congress to "restore the law as generally understood prior to *Toucey*" in no way indicates an intent to broaden the power of federal courts to enjoin state court proceedings further than necessary to abrogate that decision. The narrow construction advanced by Petitioners would foster the intent of the 1948 amendment while at the same time effecting the primary purpose of the Act - to limit federal court injunctions of state court proceedings.

C. Principles Of Comity And Federalism Prohibit An Injunction In This Case.

Bank and Herbert argue that principles of comity, federalism and equity do not apply in these circumstances. (Respondent's brief p.25). That argument simply ignores this Court's decision in *Mitchum v. Foster,* 407 U.S. 225 (1972).[3]

All the commentators who have discussed §2283 emphasis that there are no "automatic exceptions." Professor Moore, cited by Bank, states:

> As with any exception to §2283, a party must demonstrate sufficient need to be entitled to relief under the relitigation doctrine. The fact that an exception to §2283 exists is irrelevant in the absence of a further demonstration that a party equitably entitled to relief under said exception.

Moore's Federal Practice and Procedure, Para. 0.208a[3].

The American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts, §1372, page 306 (1968) is cited and quoted by Bank:

> Ordinary a federal court would and should so defer. The requirements of irreparable harm and lack of any other adequate remedy by implicitly under present statute...but power should exist to grant the injunction in the *unusual case* where those requirements are met.

It is not surprising that Bank and Herbert argue that principles of comity, federalism and equity should not apply to the injunction in this case. If those principles are applied the

---

[3] Indeed, the policy that the propriety of an injunction of a state court proceeding must be determined by principles of comity, federalism and equity was so important that three members of this Court, Chief Justice Burger and Justices White and Blackmun specially concurred in *Mitchum* to make that requirement clear.

necessity to reverse the injunction is readily apparent. Principles of comity and federalism weigh strongly against an injunction of a state court proceeding where the state court has invested substantial judicial resources and where there is no direct conflict between the earlier federal judgment and the state court action. This is especially true where the basis for the federal injunction - the application of res judicata or collateral estoppel -had been fully and fairly litigated in the state court.

The only argument Bank and Herbert make to excuse their knowing waiver is the suggestion that it was not clear the federal judgment barred the State Action until the State Action had been tried on the merits. That argument is curious indeed. If the preclusive effect of the federal judgment was so unclear as to require a trial on the merits in state court in order to determine a conflict, then this is not the case in which a §2283 injunction should be granted. An injunction of a state court proceeding under the relitigation exception to §2283 must be limited to circumstances where relitigation is "clear and unequivocal".

III. The District Court Erred In Enjoining The Trustee Who Was Not A Party To The Federal Action.

Bank suggests three arguments to support the injunction of the Trustee who admittedly was not a party to the Federal Action. First, Bank suggests that the Trustee is barred because he failed to intervene in the Federal Action. The argument ignores the fact of the intervening bankruptcy and the limited power given to a trustee in bankruptcy. The Trustee succeeded to all actions filed by the bankrupt prior to the adjudication of bankruptcy. Here the Trustee succeeded to the bankrupt's interest in the State Action. After proper motion by the attorney for the Trustee, the bankruptcy court granted the Trustee authority to pursue that action. (A.296, 289).

After the adjudication of bankruptcy, the remaining Petitioners brought a separate action in federal court. Without dispute those parties had no authority to represent the Trustee

and sought no relief on behalf of the bankrupt. Since no interests of the bankrupt were at stake in the Federal Action the Trustee had no power or duty to intervene.

Bank and Herbert assert and the district court found that the Federal Action would have primarily benefited the bankrupt. There is simply no evidence to support such a finding. The complaint, Bank's answer, pretrial order, the argument and the trial court's order on motion for summary judgment clearly show that the Plaintiffs in that case sought only damages they had incurred separate and aside from the bankrupt corporation. Trustee agrees that the Federal Action Plaintiffs were not entitled to recover for diminution of the value of the stock in the bankrupt and the Trustee later recover for the assets the bankrupt lost. (See Respondent's Brief p.37) However that issue was never decided since the issue of damages was never litigated in the Federal Action. The damages suffered by the bankrupt were claimed only in the State Action and Trustee succeeded to those claims which were assets of the bankrupt.

Bank and Herbert's argument that the Federal Action Plaintiffs claims in the State Action are barred is bottomed on the allegation that those parties split a single cause of action and sought recovery in two forums. It is curious indeed that Bank and Herbert also argue the Trustee is barred because he did *not* do the same thing!

Bank and Herbert also contend that the injunction of Trustee is proper because he was adequately represented by the Plaintiffs in the Federal Action. Bank and Herbert cite no case where adequate representation has been found absent the simultaneous finding that the party to be bound authorized himsef to be represented in the prior action. In those cases where both findings have been made the preclusive effect has been limited to issues actually adjudicated in the earlier proceeding.

CONCLUSION

For the reasons stated herein and in their original brief Petitioners respectfully request that this Court reverse the injunction and remand the case for dismissal with prejudice.

Respectfully submitted,

FRANK M. WILSON
BEASLEY AND WILSON
418 South Hull Street
Montgomery, Alabama 36104
(205) 269-2343

Counsel of Record for Petitioners, Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons

*JAMES JERRY WOOD
JAMES T. SASSER
WOOD AND PARNELL
641 S. Lawrence Street
Montgomery, Alabama 36101
(205) 832-4202

**Counsel of Record for Petitioner, A. Pope Gordon, Trustee in Bankruptcy for the Estate of Parsons Steel Industries, Inc.*